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THE ENDANGERED SPECIES ACT: THE ROLE OF HABITAT CONSERVATION

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SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

THE ROLE OF HABITAT CONSERVATION PLANS IN THE
IMPLEMENTATION OF THE ENDANGERED SPECIES ACT

JUNE 16, 1993

Serial No. 103-32

Printed for the use of the Committee on Merchant Marine and Fisheries



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THE ENDANGERED SPECIES ACT: THE ROLE OF HABITAT CONSERVATION

WEDNESDAY, JUNE 16, 1993

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, COMMITTEE ON MERCHANT MARINE AND FISHERIES,

Washington, DC.

The Subcommittee met, pursuant to call, at 10:20 a.m., in room 1334, Longworth House Office Building, Hon. Gerry E. Studds [chairman of the Subcommittee] presiding.

Present: Representatives Studds, Hochbrueckner, Hamburg, Hutto, Saxton, Weldon, Gilchrest, and Cunningham.

Staff Present: Sue Waldron, Gina Deferrari, Lesli Gray, Leigh Clayton, Liz Megginson, Laurie Wilkerson, Harry Burroughs, Cyndi Wilkinson, Laurel Bryant, Margherita Woods, Jayne Anne Rex, Tom Melius, Eunice Groark, Tod Preston, and Brita Otteson.

STATEMENT OF GERRY E. STUDDS, A U.S. REPRESENTATIVE FROM MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Mr. STUDDS. We will begin. We are going to invite anybody who wishes to, who is unable to find a seat, to fill in around this lower horseshoe here, especially those who wish to write. So do not hesitate to sit down in there, if you wish to grab a seat.

The Subcommittee meets this morning to discuss the role of habitat conservation plans, known unfortunately as HCPs, in the implementation of the Endangered Species Act. HCPs are a prerequisite for receiving permission from the Fish and Wildlife Service to take a listed species. In some cases, the take involves disturbing the habitat of the critter, an action otherwise illegal under the Act.

These plans are typically initiated by people with two goals: first, developing property that is home to a listed species; and second, avoiding a violation of the Endangered Species Act. HCPs allow applicants to alter or even destroy some habitat, but require that any change be offset by the acquisition and/or enhancement of the species habitat elsewhere in the same vicinity.

When the Act was amended in 1982 to add the HCP provisions, Congress had high hopes. We were hopeful that HCPs would measurably reduce conflicts under the Act, and measurably encourage creative partnerships between the public and private sectors to further the conservation of endangered species.

We now have 10 years of HCP experience. Sixteen plans have been approved by the Fish and Wildlife Service and 90 more are in

the works. Have the original high hopes been realized? With the help of today's witnesses we will attempt to discern the answer to that question:

Have HCPs measurably reduced conflicts under the Act? Have these plans adequately protected listed species? Have creative partnerships developed between the public and private sectors, and if so, what have they accomplished?

HCPs can be a very useful tool in our bag of ecosystem management tricks. However, we still must find ways to encourage the development of HCPs before species are on the brink of extinction, before the proverbial train wreck occurs. The ESA reauthorization bill I have introduced would encourage HCPs at an earlier juncture—when candidate species are involved. Our ultimate goal in all of this should be to someday eliminate altogether the need to put any species on any list.

We have several witnesses here today who have concrete, hands-on experience with habitat conservation plans. And I expect that we will hear that these plans are not quickly or easily prepared and they do not come cheaply. I am hopeful we will also hear constructive recommendations on how to make HCPs more user-friendly and still achieve the goals of protecting the species that depend on them.

Are there additional opening statements? Does the gentleman from California have a statement?

Mr. CUNNINGHAM. I would like to submit it for the record.

Mr. STUDDS. Without objection.

[The statement of Mr. Cunningham follows:]

STATEMENT OF RANDY "DUKE" CUNNINGHAM, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. Chairman, I would like to thank you for holding this hearing today on the role of Habitat Conservation Plans and the role they will play in the implementation of the Endangered Species Act.

As you may know, the San Diego region contains rich and diverse biological resources; many of these resources cannot be found anywhere else in the United States. It should also be brought to the Committee's attention that we in Southern California are faced with the challenge of more than 300 potential candidates, both plant and wildlife, in the San Diego region for listing.

These facts produce great challenges for us as the region continues to grow. Land needed to accommodate growth and development can create conflicts for both plant and wildlife habitats. It is for this reason that I would like to thank Chairman Studds for holding this hearing in order to address Habitat Conservation Plans.

Habitat Conservation planning in the San Diego region has become a widely supported way to resolve conflicts by way of consensus building with (local and national) environmental groups, public agencies, private landowners, and developers. Specifically, in my area we have had to focus on the California Gnatcatcher and the bird's natural habitat, coastal sage scrub. Most of the current activities in the San Diego region are designed to meet multiple habitat objectives which provide proactive plans that will prevent the need to list individual species as endangered.

In San Diego, we currently have four major multi-habitat conservation efforts underway. These Habitat Conservation programs have been sponsored by the cities of Carlsbad and San Diego. It is through these programs that lands are being identified which contain the remaining critical biological resources, and plans are being developed to design conservation areas and wildlife corridors. Each of the four major efforts is individually tailored to its specific area; yet they are being coordinated to avoid duplication and being appropriately bound together to create a regional conservation program. I can tell you that San Diego Mayor Susan Golding and the local leaders of all the participants are determined that developing this approach to species protection and development must be achieved in order to enhance

the quality of life and economy. So far, the city of San Diego has contributed at least \$5 million to the multi-habitat planning efforts.

I should also mention that the State of California has initiated a habitat conservation planning process as well, the Natural Communities Conservation Program (NCCP), that concentrates on conservation of larger units of land and emphasizes planning for environmental systems. In light of the recent listing of the Gnat-catcher as "threatened", the NCCP is charged with developing a comprehensive plan and is dedicated to working with the Secretary of the Interior, Bruce Babbitt, and the related agencies to come up with a program that is acceptable under section 10 of the Endangered Species Act to avoid the listing of the animal as endangered. It is my hope that the Administration is dedicated to working on this critical issue through financial support as well as cooperation among all the interested parties.

Mr. Chairman, it is my strong feeling that we in San Diego and the State of California can serve as a national example for resolution of environmental and developmental issues through Habitat Conservation Plans. We represent a coordinated approach with both public and private sector participation.

STATEMENT OF HON. BILLY TAUZIN, A U.S. REPRESENTATIVE FROM LOUISIANA, AND
CHAIRMAN, SUBCOMMITTEE ON COAST GUARD AND NAVIGATION

Mr. Chairman, I would first like to commend and thank you for calling this timely hearing on one of the most important matters facing our Committee this Congress—the reauthorization of the Endangered Species Act. This act is of vital importance to our country and I know the members of this Committee want to see that all of the issues surrounding this crucial environmental law are seriously discussed and debated during the reauthorization. As one who strongly supports the goals of the Endangered Species Act, I am committed to ensuring that we reauthorize a stronger law that works better for species and humans.

Mr. Chairman, in the early years of the Act's history, conflicts over its implementation were few. This fact is no longer true. In recent years, conflicts over the impacts of this Act have increased substantially. The number of listed species has increased from a few hundred to over seven hundred species—an increase of almost four hundred percent in the last twenty years. Approximately 4,000 candidate species from every State await listing. It defies human reason to argue that an act that managed several hundred species can successfully manage several thousand species without revision.

Mr. Chairman, a series of "train wrecks" occurring all over this country will eventually undermine public support for this crucial law. This Committee must work during this reauthorization to ensure that this backlash does not occur.

This Endangered Species Act is a very complicated and complex law and I am pleased that we are having a hearing today that specifically examines section 10—habitat conservation plans and the ability of private landowners to successfully obtain incidental take permits. Mr. Chairman, I believe Congress' intent in 1982 was to allow the private landowner the same opportunity as Federal agencies and landowners requiring permits—to continue their normal activities in a manner that does not jeopardize an endangered or threatened species. I do not believe Congress ever intended to penalize private landowners with a tougher standard. But, that is the current situation. Only 16 habitat conservation plans have been approved and only 26 incidental take permits have been issued since 1982. The majority, if not all, of these have involved and have been issued to large corporate landowners.

Mr. Chairman, I have introduced legislation that is designed to improve the habitat conservation planning process by providing more incentives to private landowners to go through the process, by spreading the cost-sharing burden to more parties, and by making the process more user-friendly. My legislation also allows a private landowner access to the section 7 consultation process as I strongly believe that the HCP process is not a viable process for small private landowners. I also support certain provisions in your bill, Mr. Chairman, that I think strengthen the habitat conservation process.

Mr. Chairman, I am eager to work with you and my other colleagues on the Committee during this reauthorization debate as I believe we all have the same goal—a stronger endangered species act that brings true harmony to our biological system rather than the disharmony that now occurs. I believe that this hearing is a good first step. Again, thank you for calling today's hearing. I look forward to our witnesses' testimony.

Mr. STUDDS. If there are no additional opening statements, we will proceed to our witnesses. We have a panel of six witnesses. We

are going to, unless you wish otherwise, recognize you in the order in which you appear on the witness list.

I trust you have all been informed by our staff of the brutality of our procedures. We are going to ask you to submit your written comments, which will appear in full in the record and to confine your oral statements to no more than five minutes. And you probably have been alerted to or have seen the system of lights in front of you; the yellow light, when it goes on, means you have one minute left, and the red light means you are finished. We apologize for that, but we have found after long, long experience that there is no other way even to begin to get through what we must get through.

I also apologize for any delays. The House is in session, and we anticipate being interrupted by votes, so we will proceed as promptly as we can.

Mr. STUDDS. We will begin with Mr. Michael Spear, Assistant Director for Ecological Services of the Fish and Wildlife Service. Mr. Spear.

STATEMENT OF MICHAEL SPEAR, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES, UNITED STATES FISH AND WILDLIFE SERVICE

Mr. SPEAR. Good morning, Mr. Chairman. It is a pleasure to be here. You have started in your opening comments with a quick background. In order to keep within my five minutes, I will skip over some of the history and get more to the specific issues, a little more background.

The existing law and regulations provide for and encourage flexibility and ingenuity in the development of a conservation plan that will adequately mitigate the impacts of incidental taking of listing species. Again, incidental takings are those that occur as the unintended result of undertaking an otherwise lawful activity and are not the purpose of such activities.

A habitat conservation plan may address a single action proposed by a single party or can be as complex as a statewide plan involving many actions affecting a number of listed and candidate species. Arriving at the desired scope of an HCP can be a major challenge to the applicants. The Service prefers that the plan boundaries encompass the entire area occupied by the species involved and/or the entire area likely to be impacted by the activities which result in the incidental take.

Each plan must describe ways the developmental activities can be conducted to minimize the take. Service policy is to promote avoidance and minimization of impacts over mitigation. Mitigation measures may take many forms, such as preservation of an extant habitat by acquisition or conservation easement, enhancement or restoration of degraded or former habitat, creation of new habitat, establishment of buffer areas around habitat, enactment of local ordinances or alteration of local zoning to reduce or eliminate some future impacts, and habitat management plans.

Each plan must describe alternatives that the applicant analyzed that would not result in take, and the reasons why these are not being utilized.

Ideally, the Service works informally with landowners to avoid take and, thus, eliminate the need for a section 10 permit. This was done in the Georgia-Pacific case discussed later.

The applicant must detail in the conservation plan the funding that will be made available for the proposed mitigation measures. Such funding must be sufficient over the life of the permit.

Finally, because the legislative history recognized that circumstances and information may change over time and that the original plan might need to be revised, the plan also must detail the procedures developed to deal with unforeseen events.

One additional measure generally required by the Service concerns the need to ensure that proposed monitoring and mitigation will be carried out and that incidental take does not exceed levels proposed in the conservation plan and permit application.

For multi-party plans, an institutional management structures created that is legally responsible, along with the permittees, for operation of all elements of the plan. A formal agreement among all parties signatory to the conservation plan, often called the "implementing agreement," is developed to ensure that all elements of the conservation plan will be carried out. This agreement establishes an operating program for the conservation, protection, enhancement, mitigation and monitoring of the listed species.

Issuance of a take permit is a Federal action subject to the provision of the National Environmental Policy Act. The purpose of NEPA is to foster full disclosure and analysis of the environmental issues surrounding a proposed Federal action.

Although the requirements of an HCP and NEPA overlap, the scope of NEPA goes beyond analyses required in section 10 by considering impacts of the Federal action on other aspects of the natural and socioeconomic environment. Compliance with NEPA runs concurrently with the development of the HCP. The Service has the responsibility for final compliance with NEPA, but often relies on the applicant to develop the NEPA documentation.

Permit issuance requires a "no jeopardy" biological opinion as well; that is a finding pursuant to section 7 for all affected listed species. In addition, habitat conservation plans often include conservation measures directed at "candidate species" or other species of concerns that are not listed at the time a permit application is submitted. Consideration of other species facilitates the issuance of an amendment to the incidental take permit if the candidate species is listed in the future, provides better protection of the ecosystem that may be affected by proposed development, and provides a measure of certainty the developers will not have to complete the planning process with every new listing.

Progress report: To date the Service has insured 16 permits and 10 amendments, denied one application, and is currently either reviewing or providing technical assistance in approximately 95 other HCPs. We have provided a list of these for the record.

Section 10 workload continues to grow. As exemplified by an increase from assisting 50 applicants in 1991, 70 in 1992 and the anticipated 95 plans in 1993. The development of an HCP can be a long-term process and requires continuing staff and funding support from the Service. In this fiscal year, the Service estimates

spending close to \$2 million on HCP activities. The President's 1994 budget would increase this by 50 percent to 3 million.

In addition in the 1993 budget, the Service will provide funding through and matched by the Fish and Wildlife Foundation to certain HCP developers; specifically, Secretary Babbitt has announced that \$1 million, if it is matched by private funds through the Fish and Wildlife Foundation, will go to the California NCCP process.

Lessons learned:

Mr. STUDDS. Be quick.

Mr. SPEAR. I won't go into the details; I will just give you the lessons.

HCP must be linked to the species' recovery needs.

Two, HCP should consider non-listed species.

Three, HCP covering large areas facilitate a more comprehensive and coordinated planning effort.

Four, steering committees are vital.

Five, applicants should apply the NEPA process early in the HCP development.

And six, HCPs can be expensive for landowners in some cases.

And the future, I suspect we will get to in questions, so I will stop there.

Mr. STUDDS. There is no future when the red light is on. Thank you very much, Mr. Spear.

[The prepared statement of Mr. Spear can be found at the end of the hearing.]

Mr. STUDDS. Next, Mr. John Sawhill, President of The Nature Conservancy.

Welcome back, Mr. Sawhill.

STATEMENT OF JOHN SAWHILL, PRESIDENT, THE NATURE CONSERVANCY

Mr. SAWHILL. Thank you very much, Mr. Chairman. I am delighted to be here today, and I congratulate the Committee for holding hearings on the HCP process.

I guess the bottom line for The Nature Conservancy is that HCPs have worked and they should be encouraged. We have had experience in working with HCPs in a number of areas, including the Balcones Canyonland plan in Texas and also plans in Nevada and California. I bring you the benefit of that experience in testifying today.

I think one of the reasons that we support the HCP process is that they encourage ecosystem-level conservation and help avoid what Secretary Babbitt has called "train wrecks." And they are one of the few devices we have for looking at conservation on a ecosystem-wide level.

Secondly, in many cases, HCPs allow planners to address other limiting factors on species survival, such as lack of habitat management, gradual habitat degradation, and complementary recovery planning. So I think this ecosystem level approach is very important.

Second, as you know, plans can either be done on a project basis or a range-wide basis. Congress, in the past, has stressed the benefits of broad-scale planning, and we would certainly like to support

that, because we feel that unless you are looking at a habitat on a range-wide basis, you really can't be sure that you are protecting the species in question.

The third point I would like to make about HCPs is that they are built on consensus. I think this local involvement, this creation of a consensus, is very important. It has been instrumental in the success of the HCPs that we have had an opportunity to work with.

Now, some have suggested that direct consultation with the Fish and Wildlife Service under section 7 for private landowners would be preferable to the section 10 process. The Nature Conservancy feels, however, that this is not a good idea, as it would make the planning process more cumbersome than it already is and would place all the burden in the hands of the Fish and Wildlife Service.

Section 7, as you know, places the responsibility for proposing a solution and most of the work with the Fish and Wildlife Service, while section 10 allows local parties to propose a solution that works best for them. I believe that few local jurisdictions would be satisfied with the Fish and Wildlife Service determining the course of their growth.

Now, if section 7 is not a panacea, how can we make section 10 and the HCPs more attractive than they already are? Well, I think the first issue is funding. And we strongly support the idea of a Federal revolving fund to provide grants and loans for HCPs. As Mr. Spear has just pointed out, landowners whose properties harbor protected species are perhaps the least responsible for their current predicament, yet these same landowners are often burdened with the cost of developing an HCP. I think some kind of funding mechanism could alleviate this problem. And I was glad to hear what he said about the possibility of obtaining funding.

A second improvement—again echoing what Mr. Spear said—is authorizing permitting for candidate species, as long as those species are treated, for planning purposes, as if they are listed and sufficient information exists to make biologically sound decisions. I think, as Mr. Spear pointed out, that this relieves some of the uncertainty.

And finally, I think we can learn from some of the work now being done in Brevard County, Florida, where the HCP that we are facilitating includes all of the species of concern in the focal natural community, a total of 64, and provides a strong incentive for participation by the private sector. And, similarly, the California NCCP, where there is planning for more than a hundred species in the coastal sage scrub, is another example of looking at a group of species and natural communities. And again I think this provides incentives and also eliminates some of the uncertainty in the process.

So let me just conclude by saying that in the habitat conservation planning process, as really in all matters pertaining to the Endangered Species Act, the Conservancy thinks that there should be three guiding principles:

First, that we should take the ecosystem approach. In addition to looking at individual species, we should look at ecosystems.

Second, we should encourage partnerships and encourage the consensus-building process that is part of the HCP.

And third, we should have mechanisms that take a proactive approach, considering candidate species, for example, so that we can avoid the train wrecks and really protect the species in question.

Thank you very much, Mr. Chairman.

Mr. STUDDS. Thank you very much, Mr. Sawhill.

[The prepared statement of Mr. Sawhill can be found at the end of the hearing.]

Mr. STUDDS. Next, Mr. Ed Sauls of Encino, California, speaking, I believe, for the National Association of Homebuilders.

Mr. Sauls.

STATEMENT OF ED SAULS, BUILDER AND MEMBER, NATIONAL ASSOCIATION OF HOMEBUILDERS

Mr. SAULS. Thank you, Mr. Chairman. I am pleased to be here on behalf of the National Association of Homebuilders, a 164,000-member firm organization, speaking as a member of that group.

Mr. Chairman, let me commend you for convening this hearing.

The National Association of Homebuilders is committed to the preservation of our environment, but it is concerned that the approach under the Endangered Species Act does not balance environmental protection with socioeconomic concerns. Reforming habitat conservation planning with emphasis on prelisting habitat conservation plans under the Act will be instrumental in moving toward achieving that balance.

Implementation of the Act is increasingly generating conflict between species protection and other land uses. To date, 792 species are listed as threatened or endangered. Another 3,500 species are either proposed for listing or are candidate species. As we try to protect each species, builders become inundated with trying to comply with confusing regulations.

Although HCPs offer a landowner a remedy to some restrictions, they are generally reactive, too narrowly focused, expensive and very time-consuming. Under section 10(a), permits can be issued for the incidental taking of species with an approved HCP. However, very few 10(a) permits have been issued to date. Between 1983 and 1991, only seven permits have been issued nationwide. I think we have heard that 16 plans have been approved to date. Region I alone, which covers the western United States, reports that some 70 plans are in process.

Now, 10(a) permits are not required for all 792 species, but it is evident that the current HCP process is not adequately resolving the conflicts as needed, and the protection for a tremendous number of species needs to be addressed. Conflicts between urbanization and species preservation need to be resolved before species fall under ESA mandates.

Prior to listing and Federal restrictions, a much greater level of flexibility exists to meet both wildlife requirements and development needs. Early planning can enable limited financial resources to be used for the acquisition of wildlife preserves and critical corridors between preserves can be accommodated more readily if planned in advance of development.

HCPs are expensive and time-consuming. Typically they are funded by the landowner who happens to own the remaining last

habitat for a species. HCPs can cost millions of dollars and take years to accomplish.

Two examples, Coechella Valley HCP for the fringe-toed lizard cost \$25 million. The Stephens' kangaroo rat cost \$39 million, 28 million of which was funded from development fees, taking over five years for final approval, and it is still not a final HCP. The Act provides no specific deadlines for action by the Fish and Wildlife Service, causing unnecessary delays in the process.

Reauthorization of the Act presents a perfect opportunity to examine the use of HCPs, in particular prelisting HCPs, their costs, their deadlines, and their application to habitat-based planning.

To succeed at species preservation, again we must encourage prelisting HCPs. Unfortunately, though, landowners most often conclude that the costs and risks outweigh the benefits of prelisting HCPs. Let me give you two examples.

Two adjacent properties provide a comparison of the risks versus benefits of prelisting conservation in California. One landowner who took a proactive approach has spent over \$2.5 million to date to arrive at a conceptual agreement for an HCP and will commit total costs in excess of \$12 million for the take of approximately 400 acres. After three years of processing, this landowner still does not have permits for the take of species.

Now, in contrast, the adjacent landowner destroyed approximately the same acreage before a listing. For the cost of clearing the habitat, that landowner is exempt from the Endangered Species Act.

Such examples lead to the conclusion that prelisting conservation does not work. Instead, we do need to encourage prelisting conservation, we need to do it by rewards and incentives, and there are five brief points:

One, we need to strengthen the prelisting commitments to landowners;

Two, we need to provide an efficient time-certain process;

Three, provide financial incentives;

Four is to encourage the Service to do range-wide inventory and conservation of species; and

Five is to provide adequate funding for staff trained specifically for conservation, and HCP processing.

Thank you.

Mr. STUDDS. Thank you very much, sir.

[The prepared statement of Mr. Sauls can be found at the end of the hearing.]

Mr. STUDDS. Next, Mr. Gregory Taylor of Los Angeles, speaking, I believe, for the Metropolitan Water District of Southern California.

Mr. Taylor.

STATEMENT OF N. GREGORY TAYLOR, GENERAL COUNSEL, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Mr. TAYLOR. Thank you very much, Mr. Chairman, for this opportunity to address you and the other Members of this Committee. My name is Gregory Taylor. I am the General Counsel of the Metropolitan Water District of Southern California. We are one of the

world's largest water companies. We supply water to over half of the population of the State of California, 16 million people are our customers, we have 27 major member agencies.

Mr. Sawhill addressed the idea of cooperation. It is interesting that at this table, with the exception of the gentleman from Georgia, Metropolitan has had the opportunity of working with all of the people here in a cooperative manner on a project we have going on in western Riverside County, which is to build a new reservoir to provide us greater flexibility in meeting some of the problems created by endangered species in handling waters which come from the delta in the San Francisco-Sacramento area and from the Colorado River.

We are probably the only person—only agency, to be constructing a new reservoir in the West, and not only are we the only person since the environmental laws have been passed in the last 20 years, but we have done it in four years. And the reason that we have done it in four years, we decided that we would do it by the consensus process, we would not do it by confrontation; and we wouldn't be here today to tell you we are constructing our reservoir had it not been for the fact that we were able to use habitat conservation planning efforts in two ways so far—actually, we will have a third—but two ways that have been primarily successful.

One of them is the Stephens kangaroo rat. That program was set up by the County of Riverside and eight municipalities in a joint powers agency. There, we were able to participate in the program without delay, get our permits and keep going.

Our next problem, though, was that once we got our permits, certified our EIR, and were ready to start construction, the gnat-catcher arose for listing.

Our project will take approximately 10 years to complete. We cannot—could not have started the project had we not been able to see our way clear to finish it. A delay in the middle of a \$1.5 billion project is quite costly and could endanger the success of the project. Therefore, we decided to go into a prelisting agreement, which is authorized under California law, but not authorized under Federal law—although in 1982 it was contemplated by the Committee report which is cited in my comments to you—but not incorporated into the statute. Therefore, we had some risk in dealing on a prelisting basis with the Federal Government.

We have now done a prelisting agreement for 14 additional species, making a total of 16 species. We are managing all of those species at the present time pursuant to a plan under a cooperative agreement with the United States Fish and Wildlife Service, the California Department of Fish and Game, Riverside Habitat Conservation Agency, and Metropolitan. It has been expensive, but by comparison with the costs of delay, we think that it has been a bargain.

We also think that from the standpoint of being proactive and having community support for your project, that approaching the project in the way we did, which has not been done for a major public works project before, is the way in which the future goes. We have been trying to do this in a discrete area, where we are the only major player, in the hopes that we can show that prelisting multi-species agreements can work.

Because we face very grave problems with our water supply in the delta and also on the Colorado River, which are our primary supplies of water for southern California, we would urge you to consider the prelisting proposals which are in H.R. 2043, Senate bill 921, and H.R. 1490. All three of them have prelisting provisions where you get your permit up front, if you prepare a plan for specific species which are threatened or candidates. You have to keep following the plan. In other words, when the listing occurs, if you are not following the plan you don't get the protection.

On the other hand, if you are willing to gamble on the listing and put up the money and do the management in advance, then you have your permits, you have no uncertainty, and you can complete your projects.

I hope that your Committee will give serious consideration to prelisting and that you will also give serious consideration to urging multi-species plans.

Fourteen species in the area where we are building our new reservoir—which is high and dry land; it does not have any wetlands in it—is not uncommon and there will be even greater numbers in other areas. And if we don't handle it by multi-species, you will not be able to take care of the problem and you will have the same sort of confrontation which has existed to this time in the prelisting stage of endangered species.

Thank you very much.

Mr. STUDDS. Thank you, sir.

[The prepared statement of Mr. Taylor can be found at the end of the hearing.]

Mr. STUDDS. Next, Mr. Walter Jarck—

Am I pronouncing that correctly?

Mr. JARCK. That is right.

Mr. STUDDS. Corporate Director, Forest Resources, of the Georgia-Pacific Corporation, from Atlanta.

Mr. Jarck.

STATEMENT OF WALTER JARCK, CORPORATE DIRECTOR, FOREST RESOURCES, GEORGIA-PACIFIC CORPORATION

Mr. JARCK. Mr. Chairman, Members of the Committee, I am the Corporate Director of Forest Resources for Georgia-Pacific Corporation. Georgia-Pacific is a major producer of paper and wood products. The company owns and manages 6.2 million acres of forest in North America.

On April 15th of this year, Secretary of Interior Bruce Babbitt and Georgia-Pacific's President and CEO, A.D. "Pete" Correll, jointly announced a first-of-its-kind cooperative agreement to balance sound timber management with strong conservation measures to protect an endangered species. The species is the red-cockaded woodpecker, a bird native to the pine forests of the southern United States.

Under a signed memorandum of agreement, Georgia-Pacific will actively manage red-cockaded woodpecker habitat to sustain viable populations where they occur on approximately 4 million acres of the company's commercial lands in the south. Currently, 113 colonies of these woodpeckers have been located on Georgia-Pacific

land in five States—Arkansas, Louisiana, Mississippi, South Carolina, and North Carolina. The specific plan, which we are making available to this Committee—and I have copies and your secretary has copies—was developed by Dr. Gene Wood, a Clemson University professor; and John Kleinhofs, Regional Manager for Georgia-Pacific Forest Resources in Arkansas.

The core of the plan is the maintenance of woodpecker colony areas and associated foraging habitat. It consists of the roosting or nesting cavity trees, which the family group, or clan, uses throughout the year, plus a 200-foot buffer zone. Timber harvesting in the colony areas is prohibited, except when required to improve the habitat for the birds.

Our RCW initiative took more than two years to develop and test. However, this effort was critical to establishing a level of confidence within the company that would allow us to approach the U.S. Fish and Wildlife Service with the claim that Georgia-Pacific could practice red-cockaded woodpecker conservation in concert with commercial forest management. Once we entered into discussions with the Service, their biologists offered a number of constructive suggestions that supplemented the plan and were consistent with our primary objectives.

At that point in time, the only written guidance on take was developed on Federal forest office lands. Initially, Georgia-Pacific requested a letter from the Fish and Wildlife Service acknowledging that Georgia-Pacific plan would not result in a take of the woodpecker because of habitat modification. While Service officials indicated the plan was proactive and would avoid take, they were not in favor of a letter of concurrence. As an alternative, they recommended a habitat conservation plan, HCP, and the incidental take permit.

Our objective was to demonstrate that private forest management could be compatible with red-cockaded woodpecker protection. Georgia-Pacific came to the conclusion, after serious study, that the HCP fit neither the situation nor the plan we proposed. The HCP seemed to be designed for a situation in which species take would occur and a permit would be needed to mitigate destruction of habitat or loss of a species population. In contrast, the Georgia-Pacific proposal was a no-take plan.

The experience of other landowners with HCPs indicated a multi-year and costly process. Further, HCPs can require an environmental assessment or impact study, public hearings, and participation by nongovernment third parties who could raise issues unrelated to the needs of the species or the company. It had the appearance of a land development proceeding with a potential for some public controversy.

Finally, HCPs are location or site specific. Early in our discussions with the Service, we learned that the HCP on the woodpecker would have required five HCPs to cover the States where colonies had been identified on G-P land. It just did not seem to fit our objective of a positive voluntary action. Therefore, we made the decision not to pursue the HCP.

It was at this point the Fish and Wildlife Service suggested the memorandum of agreement that would be legally binding on the performance of the company and provide clear understanding of

what forestry activities would avoid take. This was a new and innovative idea that met the needs of all parties and encouraged a spirit of cooperation. We saw it as biologist-to-biologist planning with the result of good science for wildlife and forestry.

We recognize that memoranda of agreement may not apply in every case. Small landowners simply may not have the financial resources to hire a professional wildlife ecologist to develop an MOA. But we do believe there are simpler and less costly ways than the HCP plan. In addition, some situations may not lend themselves to a no-take plan. In such cases, HCP is the appropriate solution.

The point we wish to make is that the U.S. Fish and Wildlife Service and Secretary Babbitt have now made available to the private sector a new tool that allows reasonable economic use of one's property, yet provides species protection. We are highly pleased with the Secretary's leadership and support of such cooperative agreements. The Endangered Species Act does not provide many incentives for private landowners to engage in cooperative voluntary efforts. The emphasis in the Act is mainly on prohibitions and penalties.

As the Committee reviews the performance of the Endangered Species Act, particularly as it relates to the private sector, we would encourage you to consider the merits of memoranda of agreement. Secretary Babbitt stated, and I quote, "For years, private landowners have asked for direction on how to avoid take. This agreement provides a breakthrough in establishing cooperative public and private efforts to save the endangered species."

Mr. Chairman, thank you.

Mr. STUDDS. Thank you, sir. I am not sure how much more praise Secretary Babbitt's career can stand, so you might want to be careful about that.

[The prepared statement of Mr. Jarck can be found at the end of the hearing.]

Mr. STUDDS. Finally, Mr. Michael Bean, speaking for the Environmental Defense Fund.

Mr. Bean.

STATEMENT OF MICHAEL BEAN, CHAIRMAN, WILDLIFE PROGRAM, ENVIRONMENTAL DEFENSE FUND

Mr. BEAN. Thank you, Mr. Chairman. In 1991, with colleagues at the World Wildlife Fund, I prepared a report on the experience with habitat conservation planning as of that time. Your staff has copies of that report, and the testimony I am going to give today is based largely upon the conclusions that I drew in the course of assembling that report and subsequent information concerning HCP developments in the years since.

There are ten basic points I want to make in the five minutes I have:

First, Endangered Species Act habitat conservation plans have enormous potential to solve endangered species conflicts creatively and successfully. Mr. Sawhill, in his testimony this morning, said that HCPs are one of the few devices we have for looking at species needs on a comprehensive ecosystem basis. In truth, they are the

only device we have under the Endangered Species Act for those species that do not occur in large measure, or entirely, on Federal lands. And it is because they have the potential to address problems across most, or all of the range of a species, that they offer a unique opportunity to address conservation needs on an other than very site-specific basis.

The second point, however, is that habitat conservation plans aren't necessarily going to be easy. And we have heard testimony to that effect already this morning. There are two desires that development interests and landowner interests repeatedly express, and they are legitimate desires. One is to know what their obligations are with respect to not only the species that are listed today but those that might be listed in the future. And the other is to find out the answer to that as quickly as possible.

But the unfortunate truth is, there is an inherent tension between those two desires. In order to know what your obligations are going to be with respect to a great many species that are either listed or may be listed in the future, a lot of information about those species and the impacts of your projects or development upon them is required and that, frankly, takes time and it takes money. And that is why HCPs, while they offer great promise, are necessarily likely to come with significant challenge associated with them.

Thirdly, you have to understand that HCPs are built upon the foundation of the Act's prohibition against the incidental taking of endangered species. Mr. Jarck, a moment ago, explained how his company put together a plan that involved no taking of red-cockaded woodpeckers; but for another landowner, if there is taking involved, that landowner must address that taking through a habitat conservation plan. The willingness of that landowner to enter into an HCP critically depends upon his perception that the Act is, in fact, going to be enforced.

If landowners perceive that the prohibition against taking is a paper prohibition only and that the government lacks the will or the ability to enforce it, there aren't going to be many HCPs. And my testimony cites one very recent example in Florida in which the support for an HCP has been undermined, or at least potentially undermined, by a rather conspicuous failure to prosecute a landowner for clearing land after having been advised in writing by the Fish and Wildlife Service that were he to clear that land, he would likely violate the Act.

The fourth point is that HCPs do impose enormous new demands. They place enormous new demands upon the Fish and Wildlife Service, and frankly the Fish and Wildlife Service has got to have more resources to deal with these. These are a different breed of conservation activity. They are intensely time and resource consumptive.

You have heard how some of these plans take years to develop. I can assure you that the only reason I didn't bring some of the papers associated with some of these plans is because I couldn't carry them to this meeting. An enormous amount of studies are generated, and the Service has got to stay atop of a process that demands a great deal of its staff.

The next point is simply that the skills of that staff are different from the skills that one traditionally associates with a Fish and Wildlife Service game warden. Frankly, the Service has got to have skills that include expertise in public finance, private finance, land use planning, and related disciplines. Those are not skills that the Fish and Wildlife Service has a lot of depth in. It has to acquire that, and it has to build a staff that encompasses those skills.

Finally, although we have seen that the number of plans is growing, there is clearly associated with that a need to have resources to monitor the implementation of those plans as more and more of them come on line.

I think what all of those observations point to is the need for the Service to develop some in-house HCP expertise capable of giving guidance and uniform policy and direction to its field people. The Service can no longer depend upon the biologists in the field to create these plans from scratch as they have largely done.

The next point I want to make is that there is this potential confusion between the roles of sections 7 and 9. And one of the bills that has been introduced, Mr. Tauzin's bill, would allow private landowners to invoke section 7 voluntarily. My testimony describes the reasons why I think that would be a very bad development, as Mr. Sawhill has addressed. In particular, I think, were that to become law, we would probably see the end of HCPs, because frankly I think the opportunity that HCPs provide to address issues of ecosystem on a broad comprehensive basis would be undone if each landowner could invoke section 7.

I will rest there, Mr. Chairman, and be happy to answer your questions.

Mr. STUDDS. Thank you very much, sir.

[The prepared statement of Mr. Bean can be found at the end of the hearing.]

Mr. STUDDS. I want to thank all the members of the panel for understanding our time constraints. Whatever else we do with HCPs, we have to change either the name or acronym. It is just a matter of time before somebody starts calling them hiccups, or something. It has got to go.

I understand that the delegate from California is rushed, and I therefore call on Mr. Cunningham.

Mr. CUNNINGHAM. I would thank the Chairman, and I would also like to say that everybody says, "Thank you for holding these hearings," but I really mean it, Mr. Chairman. This is important, and your flexibility in holding these hearings is greatly appreciated. As a matter of fact, my effort to become an extremist environmentalist in the long term, is easier by having you do this. I appreciate that.

I would like to also ask for unanimous consent to present the statements by the Honorable Jack Fields, who has another hearing.

Mr. STUDDS. Without objection.

[The statement of Mr. Fields follows:]

STATEMENT OF HON. JACK FIELDS, A U.S. REPRESENTATIVE FROM TEXAS, AND RANKING MINORITY MEMBER, COMMITTEE ON MERCHANT MARINE AND FISHERIES

Mr. Chairman, I want to compliment you for holding this latest in a series of oversight hearings on the impact and implementation of the Endangered Species

Act. Clearly, reauthorization of this landmark environmental law is one of the most important legislative issues facing our Committee this year.

The focus of today's hearing is habitat conservation plans (HCP's), which became an integral component of the Endangered Species Act when it was amended by Congress in 1982. The fundamental goal of this provision is to involve the private landowner in the conservation of species habitat while allowing for development and other land uses. Specifically, section 10 of the Act authorizes the Secretary of Interior to issue permits to individuals who demonstrate that the taking of an endangered species on their land is incidental to, but not the goal of, the lawful activity they wish to undertake.

Mr. Chairman, during the past 11 years, the Secretary of the Interior has approved some 26 habitat conservation plans with another 90 under development. While the goal of the HCP process is a worthy one, it has come under criticism by various groups because the approval process is difficult, time consuming, and expensive. Simply put, it is nearly impossible for a small property owner to take advantage of this provision because of the time and resources necessary to complete the process. Therefore, in most instances, only large real estate or development companies have been able to obtain approval of habitat conservation plans.

To address some of these concerns, the Endangered Species Act should be amended to allow average taxpaying property owners to use the authority in section 10 without committing massive amounts of time or money to such an effort. It is my hope that when we reauthorize this Act we will improve section 10 by considering such things as funding assistance, multi-species plans, establish time deadlines for plan approval, and, perhaps, an abbreviated process for private property owners. There is clearly a need to improve this section of the Endangered Species Act and we can accomplish that goal and many others by enacting H.R. 1490, the Endangered Species Act Procedural Reform Amendments of 1993.

Mr. Chairman, again, thank you for scheduling this important hearing. I look forward to listening to today's witnesses and hope they will share with us their suggestions on ways to improve the habitat conservation plan process.

Thank you, Mr. Chairman.

Mr. CUNNINGHAM. My questions are for Mike.

If you don't know the answers to these—I would like to treat it like 20 Questions—I will give you the answers, if you are not aware, but just to bring to your attention.

First of all, are you aware how much money the Department of Interior in its fiscal year 1994 budget requests for local and State NCCP planning efforts? Do you know what that amount was?

Mr. SPEAR. The Secretary of Interior, Mr. Babbitt, announced the week before last that the Fish and Wildlife Service would provide \$1 million, if there was \$1 million of matching funds available through the Fish and Wildlife Foundation, and \$2 million would go to the State NCCP.

Mr. CUNNINGHAM. Very good. That is 3 million.

Secondly, are you aware what the local governments identified as their minimum requirement, what the amount was?

Mr. SPEAR. We got a letter in from the State that—I think that the State and local governments would like to have had approximately \$5 million.

Mr. CUNNINGHAM. Yes, it actually, Governor Wilson and the Committee asked for \$6 million. The point being—is that Secretary Babbitt promised the State and local officials that there would not be any failure of this program for lack of funding. And there is a 50 percent deficiency in the amount. We would like to find support for the increase in this very important program for us. I think that cutting the State and local needs by 50 percent could jeopardize the entire program.

Secondly, I would like to shift over to the agreement for coordination of the California Bay delta, the MOA. Are you aware that

the May 12, 1993 agreement for coordination on the California Bay delta MOA, signed by most national marine fisheries and U.S. Wildlife and EPA—do you agree with the MOA's stated goal of restoring estuary habitat conditions to those existing during the 1960's?

Mr. SPEAR. I am not familiar with the details of that MOA. I am generally aware there has been considerable discussion, and I have heard of nothing to cause me to disagree with what they have come up with.

Mr. CUNNINGHAM. I agree with the intended plan, but Governor Pete Wilson has pointed out also, I think, to Secretary Babbitt that in the 1970's the population of California was half of what it is today. That is one of the reasons we picked up so many congressional seats.

If you look in 1960, we had 19 million people. And if you take a look at illegal immigration, coupled with the regular population increase, we have got nearly 38 million people today, nearly twice what it was. And to go back to the 1960's standard for water—and we weren't even drawing water until 1973—is unreasonable, in my view.

And I would also like to agree with what Mr. Taylor has been saying and the gentleman next to him, as far as the importance of water sanctuaries and the implementation of water storage areas and how we have been prohibited in the State of California. And I would ask that you take a serious look on how you think that we can go back to the 1960 levels when our population has increased by 50 percent. It is going to be very difficult to do and we would like—you know, Governor Wilson, the State, and Federal would like to work with you in implementing that, because it is going to be very difficult, Mike.

Mr. SPEAR. If I might respond, I believe the 1960's standard that you mentioned is not based on going back to a certain period of time. They are trying to reach a certain set of conditions to meet the requirements of two Federal laws, the Clean Water Act and the Endangered Species Act. And what I suspect has happened—it was back in the 1960's when those conditions met—the species were healthy and the water quality was consistent with the Clean Water Act requirements. So it wasn't just that they picked the 1960's.

Mr. CUNNINGHAM. Let me point out to the Chairman, also, where the Endangered Species Act has helped in many ways, the Miramar Naval Air Station, along with all our other military bases in base closure hearings, was actually protected because they won't be encroached upon due to the Endangered Species Act. It has actually helped to save our military strength in some ways, by prohibiting civilian housing and building around habitat areas.

So this is one area that—and also it is our goal, and I would like to work with you, Mike, in California to make every base, military base, one of these sanctuaries so that we can set aside lands for water storage and other things as well. We are already done that with Miramar.

Mr. SPEAR. And Camp Pendleton.

Mr. STUDDS. I assume the gentleman's base is not on the threatened list.

Mr. CUNNINGHAM. That is right, not now.

Mr. STUDDS. The gentleman from New York.

Mr. HOCHBRUECKNER. Thank you, Mr. Chairman. I don't have any questions at this time, but I do commend you for hosting this very important hearing. It has been very educational. Thank you.

Mr. STUDDS. I thank the gentleman.

The gentleman from New Jersey.

Mr. SAXTON. I have just one question for, particularly, Mr. Sawhill; anyone else might want to comment on it.

I know your organization has done a great deal of work with regard to listing of endangered species. Where are we in the process and how far do we have to go, I guess?

Mr. SAWHILL. Well, I guess you can look at the glass as being half-full or half-empty. Frankly, we feel the glass is half-empty, that the Fish and Wildlife Service has not had adequate funding for the listing process; and we are hoping that in the reauthorization of the Endangered Species Act there will be funds provided so that the listing process can proceed on a more expeditious basis.

Mr. BEAN. Mr. Saxton, may I respond as well?

My colleague, Mr. David Wilcove did an analysis this past year of the rarity of species that have been listed, added to the list, since 1985. And what he found really is quite disturbing. Plants, for example, which comprise the majority of species that have been added to the endangered list since 1985 have had a median population size at the time of listing of fewer than 100 individuals. What that means is that we are not listing many species until they are literally on the brink of extinction, until they are literally at the point at which recovery efforts are almost certain to fail.

I think the importance of that is twofold: First, the Fish and Wildlife Service needs more resources so that it can address the needs of species eligible for listing sooner; and secondly, there is clearly a need to expedite the listing process, not encumber it with additional procedures and requirements as some of the bills that have been introduced would do.

Thank you.

STATEMENT OF HON. H. JAMES SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY, AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON ENVIRONMENTAL AND NATURAL RESOURCES

Mr. Chairman, I want to thank you for holding today's hearing to allow us an examination of the provision for Habitat Conservation Plans (HCP) within the Endangered Species Act (ESA). Although we are here to learn today, I believe the HCP provision, if improved, can be the most important component of the Act and a primary tool for achieving its goals.

Similar to other conservation legislation, the ESA has gained an unfortunate reputation for impeding, sometimes abruptly stopping, the economic growth that is vital to the stability of our communities. This has served to only further undermine the intended goals of the Act—keeping them separate from the economic needs and the culture on which their success depends.

In recent years, the HCP provision has provided States and communities with an alternative to the painful confrontations that have pitted economic stability against an unsuspecting creature whose survival is threatened with possible extinction. It provides an opportunity for proactive planning, comprehensive involvement of all parties concerned, and recognizes the necessity to preserve socioeconomic stability as well as ecological health.

I have briefly read through some of today's testimony and am impressed by the articulate comments that will be presented. It is clear that the HCP provision—if allowed to include planning for multiple species, if streamlined and given priority status within the Fish and Wildlife Service bureaucracy, and, if supported more

forcefully with creative funding mechanisms—can better achieve the goals of the Act while preserving opportunities for the economic growth necessary for the health of our communities.

I look forward to hearing from the witnesses today, and working with them to improve the integrity of the ESA.

Thank you, Mr. Chairman.

Mr. STUDDS. Gentleman from California.

Mr. HAMBURG. Thank you, Mr. Chairman. I, too, congratulate you for holding this hearing and certainly a very important issue in my district as well.

I would like to ask unanimous consent that I be allowed to enter my statement into the record, Mr. Chairman. Is that OK, to enter my statement into the record?

Mr. STUDDS. With absolutely no objection.

Mr. HAMBURG. Thank you, sir.

STATEMENT OF DAN HAMBURG, A U.S. REPRESENTATIVE FROM CALIFORNIA

Good morning, Chairman and colleagues. Today's hearing focuses on the effectiveness of the Habitat Conservation Plan: the statutory tool devised to ensure that use of private lands inhabited by listed species does not impair the species' survival. The needs of the species compete and interfere with uses to which the land might otherwise be put. Understandably, the property owners jealously guard the right to use their lands as they wish.

The HCP is the tool to balance those competing interests. We must evaluate that tool carefully. We must make sure that its blade is sharp and that it swings true. The risks of faulty work are too great. On one hand, we unnecessarily limit reasonable use of our lands and natural resources. On the other, we jeopardize survival of threatened and endangered species.

Examination of the HCP process inevitably invites comparison with the Section 7 consultation process used to evaluate proposed action on federally owned lands. In making such a comparison, we must remember the fundamental difference between publicly and privately owned lands. Federal lands are owned by the Government because they are necessary for some public purpose. The Federal agency entrusted with management of any particular property does so consistent with the hierarchy of public values it is charged to promote. If the property is inhabited by a listed species, the managing agency is required to subordinate all other public values to the public interest in preserving the species. The managing agency consults under Section 7 with its sister agency, the Fish and Wildlife Service, to ensure that proposed action does not jeopardize survival of the species or its critical habitat.

By marked contrast, private lands are not owned for public purposes. Private land is owned to further private use and gain. When activities are proposed on private lands populated with a listed species, potential conflict between private and public purposes is resolved through the HCP process. The Fish and Wildlife Service's role in that process necessarily reflects its different relationship to the landowner; they are not sister agencies each dedicated to furthering the public's interests.

Clearly, this difference prompted development of a different process for review of activities on private and public lands. As we look at proposals to change the HCP process we must keep in mind the basic difference between private and public property. We must ensure that our processes are tailored to promote the fullest possible use and enjoyment of private lands consistent with the public commitment to the value of preserving listed species whether found on public or private lands.

Mr. HAMBURG. And I would like to just ask a couple of questions.

First, Mr. Sawhill, I am sorry I missed your testimony, but in reading your written testimony, you described the consensus-building process that has been successful in developing the HCP. Your testimony referred to development of a public-private partnership which enhanced conservation goals and brought significant resources.

Could you comment on the memorandum-of-agreement approach which was outlined by Mr. Jarck? Do you perceive a loss of public

benefit in this kind of approach because it doesn't really incorporate the amount of public input that we have as part of the HCP process?

And also can you see a way in which the consensus-building benefit to which you referred could be incorporated into the memorandum of agreement process without making that process inefficient or less effective?

Mr. SAWHILL. Well, it seems to me there is room for both. You know, I would certainly think that the memorandum-of-agreement process can be used selectively with private landowners of the size and competency of a company like Georgia-Pacific. And I do think there might be ways in which public participation could be gained. Because, you know, although this is all on private lands, it nevertheless is affected by the public interest, and so I think there could be some kind of consultation process built in with State and local agencies and community leaders.

But I would hate not to maintain that avenue for dealing with species like the red-cockaded woodpecker, because I think we benefited significantly in that process.

Mr. HAMBURG. And as I understood it, that works best where you have a very large land base that you are working off of rather than a more contained area where you are trying to protect a particular species?

Mr. SAWHILL. Yes, I think it is the large land base, as well as the sophistication of a company like Georgia-Pacific, and also the resources that a company like Georgia-Pacific is able to bring to the process.

You know, in other cases where you have a multitude of small landowners, you don't have any one of them with sufficient resources or the scientific capability to really develop a plan such as was developed in this case.

Mr. HAMBURG. Would anyone else like to comment on that issue? Yes, sir.

Mr. BEAN. I would be happy to do so on the first part of your question.

The agreement with Georgia-Pacific, as was described, was an agreement whereby the company agreed to manage its lands in such a way that no taking of red-cockaded woodpeckers would occur and, in particular, to manage its lands in a way that was consistent with some, as yet, draft guidelines that the Fish and Wildlife Service is preparing with respect to defining what a "take" is in terms of timber harvest in woodpecker habitat.

I think a way of ensuring effective public participation is to have those guidelines made available for public input and review. They are not regulations; they have not had the benefit of any public input to date, and I think providing that sort of public input into those guidelines would ensure at least a modicum of public participation underlying agreements like the one with Georgia-Pacific.

Mr. HAMBURG. Thank you.

Anyone else?

Mr. JARCK. Yes.

Mr. HAMBURG. Yes, Mr. Jarck.

Mr. JARCK. While the MOA was designed for large ownerships, I think it can work with fairly large ownerships and medium-sized

ownerships. I think it has some possibilities of grouping many small landowners in a county or in a State or region, or perhaps as a cooperative, several landowners can get together and work out this type of agreement.

I don't think it will work for the 10-, 15-, or 200-acre person, but I think it could for county-wide or even larger than that.

Mr. HAMBURG. Thank you.

Mr. Bean, if I could go back to you, you referred to the difficulties that are encountered in enforcing the Endangered Species Act when a party violates a particular condition of an HCP. And as I understand it, the Fish and Wildlife Service must prove both that a specific condition was violated and also that an incidental take in fact occurred.

As I understand the HCP, the conditions on the proposed activity exist exclusively to limit the take potential. Would you comment on the feasibility of eliminating the need to establish independently that an incidental take occurred if an HCP condition is violated? And I wonder if this approach could be incorporated as an additional provision of the memorandum-of-agreement approach referred to by Mr. Jarck.

Mr. BEAN. Yes, sir. The part of my testimony that you refer to is where I try to explain the different treatment under section 7 and section 10 because of a pending proposal to give private parties the option of invoking section 7.

At present, if an incidental taking occurs as a result of an activity that is addressed by section 7, the Fish and Wildlife Service can impose conditions to minimize that incidental taking. But those conditions are not obligatory upon the party. The party, if he chooses to abide by those conditions, will be assured that he will not commit a taking that will be prosecuted; but if he chooses to ignore those conditions, his ignoring of those conditions does not violate the Act.

All it means is the Fish and Wildlife Service is free to prosecute him in the event that a taking occurs. However, proving that a taking has occurred is often extremely difficult, because most of these incidental takings are not going to result in a readily identifiable dead carcass of an animal. Most of them are going to involve destruction of habitat, and one infers from the destruction of habitat the likely loss of some representatives of that species. But proving that there has, in fact, been an actual loss is exceedingly difficult.

So my recommendation was that we need to correct that part of section 7 which makes those conditions not really conditions at all in the sense that they are obligatory.

I think in the HCP context, the problem doesn't really exist because there is a permit that is issued for an HCP and a condition of the permit may be anything the Service chooses to make a condition, and violation of that condition can result in revocation of the permit, as well as prosecution for taking if that results. So I think there is more safeguard built into the HCP context at present than under the section 7 context. And my recommendation was to remedy that in section 7, particularly if the Committee intends to take seriously the proposal to allow landowners the option of invoking section 7 instead of an HCP.

Mr. SAULS. Mr. Hamburg, if I may, I would like it address your earlier question.

Mr. HAMBURG. OK.

Mr. SAULS. I think the memorandum-of-agreement is a good approach as it applies to situations where there is no take. I question its applicability, however.

In California, for example, we have a situation where with the listing of the gnatcatcher, they are requiring a permit just to survey the birds, saying that the calling of the bird is a harm and harassment and therefore a take of the species. And so you have to wonder where the line is in defining take. And quite possibly a solution for that might be to—as many of us have suggested, is to expand and make more flexible the section 10 provisions.

Maybe the cooperative management provision under a section of the H.R. 1490 bill could allow for that and still allow for the suspension of section 9 and provide the large public participation as well.

Mr. HAMBURG. Thank you.

Thank you, Mr. Chairman.

Mr. STUDDS. I thank the gentleman.

I have just been sitting here thinking about these two examples and I understand that there are great differences between the two, in both the problem you confronted and the way in which you approached it. But they do seem to have in common, I guess, common sense and a good deal of goodwill; and they both do seem to demonstrate that the Act, even with all of the criticisms of it as currently written, is capable of working occasionally. It certainly appears in those two instances to have been made to work in a way that, as I understand it, has most parties, presumably including the endangered critters, relatively happy with the outcome.

I wonder—we can't mandate, we can't legislate common sense or goodwill as we have demonstrated repeatedly; and, given our inability to do that, I wonder if both or either Mr. Jarck and/or Mr. Taylor would like to reflect a little bit on whether it is fair to draw some of the same conclusions, notwithstanding the differences, from these two examples?

In Georgia-Pacific's case there was literally no taking necessary in order to accomplish what needed to be accomplished. I gather in the California situation there was. Was there a substantially greater acreage?

How much acreage did you have in question in the California case?

Mr. TAYLOR. Over 5,000 acres of land were involved, but of take—263 of the Stephens kangaroo rat. I don't know what the acreage of gnatcatcher would be, but about 30 pairs.

Mr. STUDDS. Well, the eternal optimist would listen to your testimony and say, maybe we don't need major tinkering with the statute; maybe with the right leadership, both at all levels of government and in the private sector, it can work, or with minor adjustments be encouraged to work. Do you draw that lesson from your own experience?

Mr. TAYLOR. Yes. I think that you do need the prelisting provision. I think that you are at substantial risk in undertaking an

HCP at a prelisting stage unless you have the guarantee of a permit.

We handled that by accomplishing the take immediately after getting our prelisting agreement. I don't think that was the most desirable way to do it, but it was the only practical way. And we did it with the understanding of both the California Department of Fish and Game and U.S. Fish and Wildlife Service. As a matter of fact, they thought that in one respect it was better that we would accomplish the take, because then they knew what the impact was and therefore they could quantify it.

Our—I think that there is some institution within the Service, some problems with prelisting, because they feel that they are only buying into a controversy later on when the take occurs, unless you give the permanent at the time you do the plan so that their administrative process is completed. And both your bill and the Baucus bill does take care of that problem.

Mr. STUDDS. All three pending bills, as I understand it, have an analogous provision in them, which would seem to auger at least some hope.

Mr. TAYLOR. We would hope so.

Mr. STUDDS. Mr. Jarck.

Mr. JARCK. I think that you have before you a breakthrough. This is an alternative to the HCP. I think the HCP works in certain instances, on certain issues, and with "take" situations. The MOA works, we think, very well in no-take situations. If you can encourage more MOAs, I think we would all be ahead, because you would be getting very proactive, voluntary cooperation from large landowners with the MOA concept included in legislation.

Mr. STUDDS. I would like to find a better acronym for them, too. It is better than an MOU, I suppose, but only marginally.

Does anybody else want to respond?

Mr. Sawhill?

Mr. SAWHILL. I would just like to endorse the general point that you made, and that is that the Act is working, and it seems to me that it does not need major change. It needs minor tinkering in order to make it work more effectively, and that was the point that I was trying to make. But with prelisting, with perhaps more funding for the planning process itself; a little up-front money, I think, can yield tremendous benefits on the back end.

And finally, Mr. Bean's point about maybe some new staffing and funding for the U.S. Fish and Wildlife Service to enforce the Act, would, it seems to me, accomplish most of the objectives that we have set out.

Mr. STUDDS. On that subject of funding, which is an increasing quandary around here and everywhere else, I understand that the State of Florida has something called Preservation 2000 that has been extraordinarily successful in generating substantial funds; is that correct?

Mr. SAWHILL. Yes, it is extraordinarily successful. The State of Florida did an assessment of what they would need to protect the species and wildlife habitat in the State and came up with a figure of \$3 billion.

Mr. STUDDS. \$3 billion?

Mr. SAWHILL. \$3 billion, and it has established a program called Preservation 2000, which is funded at the rate of \$300 million a year over a decade to protect not only fish and wildlife habitat, but also to create recreational areas and open spaces.

It has been a major commitment on the part of the people in the State, and, frankly, is a good example for the rest of the States and the Federal Government about what can be done in order to provide funding.

Mr. STUDDS. What is the source of that funding?

Mr. SAWHILL. I think it is a real estate transfer.

Oh, it is a bonding issue, right, that the bonds, in turn, are paid for by a real estate transfer tax.

Mr. STUDDS. In just a moment I am going to—do I see a hand over there?

Mr. Bean.

Mr. BEAN. I just wanted to add with respect to Florida's Preservation 2000 land acquisition program, it is worth noting that that State, that single State's land acquisition program generates roughly twice the amount of money for land acquisition as the entire budget for land acquisition of both the National Park Service and the Fish and Wildlife Service combined.

Mr. STUDDS. That had occurred to me. Very embarrassing, and we are going to move on to something else immediately.

I am going to ask each of you in a moment, if you wish, to give us one final piece—I am going to call the gentleman from California first, he has another question, but—one final piece of advice, if you were able to suggest one change in the statute as we contemplate its reauthorization, what do you think is the single most important thing we could do?

Does the gentleman from California wish to ask some more questions?

Mr. HAMBURG. No, Mr. Chairman. I just continue to be concerned about the ways in which the public can impact whatever process we have. This is a very touchy point in northern California, particularly with this incidental take issue. It has been very contentious. Often State agencies and the Federal agencies end up in conflict with each other. And I also believe that as we move forward, we must continue to be vigilant about the opportunity for public input in the process without creating a process that absolutely becomes jammed.

It is that delicate balance that I am looking for: a balance between efficiency and expediency on one hand, and adequate opportunity for public participation and expression of concern on the other.

Mr. STUDDS. OK. Does anybody, before we suspend operations here, want to give us one closing piece of advice with regard to the single most important change we might make to the statute?

Mr. Sauls?

Mr. SAULS. Thank you, Mr. Chairman.

You have heard much about the need for clarification of the pre-listing authority. I would like to emphasize the need for the HCP processing to have specific timeframes and to be recognized as a mandatory action under the Act. Even the much acclaimed NCCP program, I am informed by California divisions of the Fish and

Wildlife Service, the processing of NCCPs will be subordinate to other mandatory actions such as section 7. And I don't think that is where our priorities should be.

Mr. STUDDS. I appreciate that. Does anyone else wish a final word?

Mr. Bean.

Mr. BEAN. I think the clearest need the Act has is to create some incentives for private landowners, in particular, to manage their lands in ways that will benefit endangered species. The Act relies very heavily upon the stick of penalties and prohibitions to achieve its goals of deterring harmful conduct, but it does not at present offer many carrots for rewarding beneficial conduct. And since many of our endangered species do occur, in whole or in large part, on private lands, their future is intimately tied to what private landowners do.

I think your bill, by creating authority for the Secretary of Interior to enter into contracts with private landowners, under which they could receive payments for carrying out actions that would contribute to the recovery of endangered species, is a good idea; but the larger and more general point is that we need to think very creatively about other ways of encouraging and rewarding beneficial conduct on private lands.

Mr. STUDDS. Anyone else?

Mr. Taylor.

Mr. TAYLOR. Mr. Chairman, I would again come back to the need for some kind of ability to be proactive at the prelisting stage. And I think that the amendments permitting prelisting would do that. There is no incentive for a person to cooperate with the listing process. As a matter of fact, most—the standard thing is to fight the listing, because that is the only choice you have if you are a landowner, and hope that you can defeat it; or to delay it long enough to get accomplished whatever you think you need to do with your property.

The prelisting process will probably be cheaper because it is not inexpensive to fight listings. And if you have that, if you have the choice of doing that, then I think that you would probably see a basic change in how people approach the Act.

We have one additional part in relation to that, and that is, we are going to be going into water environments. And most of your programs have been in dry land areas. But in order for us to succeed with our water needs, we are going to have to develop HCPs in water environments in the delta and on the Colorado River. And we think that we may need to suggest some language to ensure that the Act would encompass that. Thank you very much.

Mr. STUDDS. Thank you.

Anyone else?

Yes, sir.

Mr. SPEAR. Mr. Chairman, I would like to add something to the prelisting discussion that has already gone on, and support that notion of the importance of being able to deal with the prelisting arrangements. But what I want to add is that in our 1994 budget request that is up here in front of Congress right now, we put a significant amount of money in the prelisting area of the budget. And what we are talking about here, as it relates to HCPs, fits per-

fectly with a broader notion that we have in the Fish and Wildlife Service and the Secretary is strongly supporting; and the idea is that there are a lot of species out there that, if we notified people and get working with them, provide some incentives, we will not need listing, that there are activities that can be undertaken that are going to save the government a lot of private pain, save a lot of concern and remove some of the pressures on the—that exist on the Act now.

So the whole discussion here about prelisting and HCPs fits into a larger context of a much greater prelisting effort that is needed.

Mr. STUDDS. I don't suppose your funding request compares with the State of Florida, does it?

Mr. SPEAR. Well, it compares, but not well.

Mr. STUDDS. Well, the spirit is right, any way.

Does anyone want a final word?

If not, I want to thank all of you for your cooperation and your extraordinarily constructive approach to this. I think it has been a very significant hearing, and we may very well call upon you individually and perhaps institutionally as we proceed.

Thank you and the Subcommittee stands adjourned.

[Whereupon, at 11:32 a.m., the Subcommittee was adjourned, and the following was added to the record:]

STATEMENT OF MICHAEL SPEAR, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES, UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES, CONCERNING IMPLEMENTATION OF HABITAT CONSERVATION PLANS UNDER SECTION 10 OF THE ENDANGERED SPECIES ACT

June 16, 1993

Mr. Chairman, it is a pleasure to be here to discuss the Fish and Wildlife Service's experience with habitat conservation planning under section 10 of the Endangered Species Act.

Interest in habitat conservation planning continues to grow. The Department of the Interior and the Service believe habitat conservation planning is an endangered species management tool that works. As the Committee prepares for reauthorization of the Act, it is our hope that we can continue our dialogue on this important provision.

Today, I would like to cover four general areas. First, I will briefly describe the history and operating procedures behind the existing program for habitat conservation planning and incidental take permits. Second, I will highlight what has been accomplished to date. Third, I will discuss the lessons learned over the last decade. Finally, I will offer some thoughts on the future of the program.

THE HABITAT CONSERVATION PLANNING PROGRAM

Legislative History -- In the early 1980's, it was apparent that non-Federal entities with otherwise lawful proposed developments, such as urbanization or forestry activities, faced a seemingly unresolvable statutory conflict when such development would likely result in the incidental take of a listed species. "Take" is defined in the Act, in part, to include the killing, harming or harassment of federally listed species.

At that time, the only activities under the Act that could be exempted from the taking prohibitions were scientific research, captive breeding, and similar conservation actions. Thus, private individuals with otherwise lawful proposed developments faced a seemingly irresolvable statutory conflict when such development would likely result in the take of a listed species.

This Committee responded in 1982 by amending section 10 of the Act to establish an incidental take permit provision that includes the development of habitat conservation plans (HCPs). The provisions authorize the Secretary of the Interior, under some circumstances, to permit the taking of listed species if

such taking is "incidental to, and not the purpose of carrying out otherwise lawful activities" (16 U.S.C. § 1539).

Section 10(a)(1)(B) of the Act allows private landowners to carry out activities resulting in the incidental take of at least some individuals of a listed species where those activities are part of HCPs that minimize and mitigate any taking by promoting the conservation of the species.

The legislative history of these amendments shows this process was intended to reduce conflicts between listed species and private development and to provide a framework that would encourage "creative partnerships" between the private sector and local, State, and Federal agencies in the interest of endangered and threatened species and habitat conservation.

The 1982 amendments to the Act were modeled after the conservation plan developed by private landowners and local governments to protect the habitat of listed species and other species of concern on San Bruno Mountain, San Mateo County, California.

Existing Process -- The regulatory procedure results in the issuance of a section 10(a)(1)(B) permit authorizing incidental take that is mitigated by appropriate conservation measures for habitat maintenance, enhancement, and protection, coincident with proposed development [50 CFR §17.22(b)(2) and §17.32(b)(2)]. These measures are detailed in an HCP, a mandatory component of any such permit.

The existing law and regulations provide for, and encourage, flexibility and ingenuity in the development of a conservation plan that will adequately mitigate the impacts of incidental taking of listed species. Again, incidental takings are those that occur as the unintended result of undertaking an otherwise lawful activity, and are not the purpose of such activities.

A habitat conservation plan may address a single action proposed by a single party or can be as complex as a State-wide plan involving many actions affecting a number of listed and candidate species. Arriving at the desired scope of an HCP can be a major challenge to the applicants. The Service prefers that the plan boundaries encompass the entire area occupied by the species involved and/or the entire area likely to be impacted by the activities which result in incidental take of the species of concern.

Each plan must describe ways the developmental activities can be conducted to minimize the incidental take. Service policy is to promote avoidance and minimization of impacts over mitigation. Mitigation measures take many forms, such as

preservation of extant habitat via acquisition or conservation easement, enhancement or restoration of degraded or former habitat, creation of new habitat, establishment of buffer areas around extant habitat, enactment of local ordinances or alteration of local zoning to reduce or eliminate some future impacts, and habitat management plans.

Each plan must describe alternatives that the applicant analyzed that would not result in take, and the reasons why these are not being utilized.

Ideally, the Service works informally with landowners to avoid take and, thus eliminate the need for a section 10 permit. This was done in the Georgia-Pacific case discussed later.

The applicant must detail in the conservation plan the funding that will be made available for the proposed mitigation measures. Such funding must be sufficient over the life of the permit.

Finally, because the legislative history recognized "that circumstances and information may change over time and that the original plan might need to be revised," the plan also must detail the procedures developed to deal with unforeseen events. As a result, the conservation plan should provide for an amendment procedure and any other necessary measures or assurances to deal with such circumstances.

One additional measure generally required by the Service concerns the need to ensure that proposed monitoring and mitigation will be carried out and that incidental take does not exceed levels proposed in the conservation plan and permit application.

For multi-party plans, an institutional management structure is created that is legally responsible, along with the permittees, for operation of all elements of the plan. A formal agreement among all parties signatory to the conservation plan, often called the "implementing agreement," is developed to ensure that all elements of the conservation plan will be carried out. This agreement establishes an operating program for the conservation, protection, enhancement, mitigation, and monitoring of the listed and candidate species occurring within the plan area, and defines the roles, obligations, authorities, responsibilities, liabilities, benefits, rights, and privileges of all parties or signatories to the conservation plan.

Issuance of an incidental take permit is a Federal action subject to the provisions of the National Environmental Policy Act (NEPA). The purpose of NEPA is to foster full disclosure

and analysis of the environmental issues surrounding a proposed Federal action.

Although the requirements of an HCP and NEPA overlap to a great extent, the scope of NEPA goes beyond analyses required in section 10 by considering the impacts of the Federal action (issuance of the permit) on other aspects of the natural and socioeconomic environment (i.e., water quality, water supply, social and economic entities, recreation, infrastructure, and other issues), and by more complete analysis of alternative actions. Compliance with NEPA runs concurrently with the development of the HCP. The Service has the responsibility for final compliance with NEPA, but often relies on the applicant to develop the NEPA documentation.

Permit issuance requires a "no jeopardy" biological opinion finding pursuant to section 7 for all affected listed species. Thus, due to the different level of protection afforded to listed plant species under the take prohibition, the applicant need not specifically address or discuss listed plants in a conservation plan, but listed plants, as well as animal species, must not be jeopardized by the proposed permit and conservation plan. A thorough discussion of the conservation proposed for listed plants in the conservation plan, however, should ensure that the proposed permit will not jeopardize plants.

In addition, habitat conservation plans often include conservation measures directed at "candidate species" or other species of concern that are not listed at the time a permit application is submitted. Consideration of other species facilitates issuance of an amendment to the incidental take permit if the candidate species is listed in the future, provides better protection of the ecosystem that may be affected by proposed development, and provides a measure of certainty to developers that they will not have to repeat the planning process with every new listing.

The conservation planning process has been characterized by a mutual understanding of the objectives of wildlife conservation and management and the economic and social values derived from local development.

PROGRESS REPORT

To date the Service has issued 16 permits and 10 amendments, denied 1 application (based on inability of the applicant to provide mitigation prior to taking the proposed action), and currently is either reviewing or providing technical assistance on approximately 95 HCPs. We have provided a list of these for the record.

The section 10 workload continues to grow, as exemplified by an increase from assisting 50 potential applicants in FY 1991, to 70 plans in FY 1992, and the anticipated 95 plans in FY 1993. The development of HCPs can be a long-term process (sometimes over several years) and requires continuing staff and funding support from the Service. In FY 1993, the Service estimates spending close to \$2 million on HCP activities. The President's 1994 budget would increase this by \$1 million.

The following examples express some of the breadth of situations encountered in this program:

The First HCP - blue Mission butterfly, San Bruno elfin butterfly, San Bruno Mountain, California -- This HCP was undertaken prior to the 1982 amendments, based on the need to resolve conflicting concerns over proposed housing development and conservation needs of two listed and one candidate butterflies, largely endemic to the mountain. The HCP resulted in preserving or enhancing 90% of the listed butterflies' habitat, while allowing limited development on the remaining 10%.

The multi-party coordination, use of experts to identify biological and other needs, commitments for land acquisition and ongoing management used in this plan were the basis for the 1982 section 10 provisions in amendments to the Act.

Single-species HCP - Coachella Valley fringed-toed lizard, Palm Springs, California -- Begun before the San Bruno Mountain HCP had been completed, this had to deal with the situation where prior and ongoing development had already made substantial inroads into the species' habitat. The challenge was to identify remaining functional habitat units that maintained the fragile shifting sand dune ecosystem.

The resulting multi-party management solution involved two Federal agencies, the State, and a private conservation organization. Private funding for some of land acquisition and ongoing management was raised from fees on developers. The importance of an independent facilitator to bring all the appropriate parties to the table was recognized through this planning effort.

Single-action HCP - Valley elderberry longhorn beetle, Lennane Properties, Sacramento County, California -- A proposed housing development would have affected nine clumps of elderberry shrubs, the host plant for the listed beetle. In a non-controversial planning effort, Lennane agreed to transplant those elderberry plants to a protected, publicly owned parkway site, and to plant and

guarantee five years survival of an additional 18 elderberry plants on the parkway. This planning primarily involved government staff and the applicant and was completed in three years.

Single-action HCP - San Joaquin Kit Fox, blunt-nosed Leopard lizard, and Tipton kangaroo rat, Delano State Prison, Kern County, California -- A proposed prison facility would destroy 287 acres of habitat for three listed species, the San Joaquin kit fox, the blunt-nosed leopard lizard, and the Tipton kangaroo rat. The California Department of Corrections agreed to maintenance of the remainder of its 640 acre tract and acquisition of an adjacent 514 acres for conservation of these species.

The noncontroversial nature of the plan, coupled with total cooperation from the State, allowed the section 10 permit to be issued in six months.

Multi-species, multi-jurisdictional HCP - Golden-cheeked warbler, black-capped vireo, five cave invertebrates and several candidate species, Balcones Canyonlands, Travis County, Texas -- This HCP encompasses a 633,000 acre area in and around Austin, Texas, and represents a significant portion of the range of the listed and candidate species. Ongoing since 1990, this effort by developers, agencies and conservation groups appears to have reached the point where assurance of funding for implementation remains the outstanding issue.

The length of time involved in plan preparation has caused some developers to seek individual section 10 permits or take authority through the section 7 process. Additionally, the late identification of another candidate points out the need for careful consideration of all species that may affect the HCP's development.

Other significant HCPs - Northern spotted owl, Simpson Timber Company -- This first HCP completed for the owl addresses modified timber management plans and owl conservation reserve areas on this private company's 383,100 acres of largely redwood holdings in Northern California. Besides working with the Service to design the appropriate mix of development and conservation, Simpson provided an opportunity for public review and comment before submitting its application.

An Alternative to an HCP - Red-cockaded woodpecker, Georgia-Pacific Company, Arkansas, Louisiana, Mississippi and South Carolina -- In cooperative efforts with the Service, another timber company, Georgia-Pacific, found that it could modify its timber management practices so

that they would not effect red-cockaded woodpecker colonies on four million acres of land. After entering into a management agreement with the Service to maintain this "no affect" situation, the company has no need to enter into an HCP.

Model HCP for wide-ranging species - Florida scrub jay, Brevard County, Florida -- Habitat for the scrub jay occurs in 36 counties in Florida. As much land use planning, including that for wildlife management, in Florida occurs at the county level, it will probably be necessary for most or all of the counties to address overlapping development and conservation needs. Brevard County has stepped forward to try and develop a model HCP for accommodating these needs. Both Federal monies and personnel resources have been identified to help develop the biological and other data needed to facilitate this HCP.

Coastal California gnatcatcher and the California Natural Community Conservation Planning Program -- Several land-use planning efforts have been initiated in California that are attempting to address the issue of conserving the coastal California gnatcatcher and the coastal sage scrub ecosystem upon which it depends. Foremost among these efforts is the Natural Community Conservation Planning Program (NCCP) sponsored by the California Resources Agency. This program represents an important opportunity to conserve the threatened coastal California gnatcatcher.

The Coastal Sage Scrub NCCP may result in the development and implementation of specific plans and management programs for the long-term protection of the coastal sage scrub community in portions of five southern California counties by addressing the conservation needs of three "target" species including the coastal California gnatcatcher. Participation in this planning effort involves a formal enrollment process whereby voluntary agreements are established between the California Department of Fish and Game and two categories of participants: landowners or land management agencies, and cities or counties. The planning area for the Coastal Sage Scrub NCCP encompasses the current range of the coastal California gnatcatcher in the United States.

A Scientific Review Panel for the State of California's NCCP is presently analyzing available information with the intent of formulating planning guidelines for the conservation and management of the coastal sage scrub community. These guidelines will be used in developing NCCP plans. The special rule, proposed for adoption at the

time the species was listed, will allow a limited amount of take consistent with the Panel's planning guidelines.

The land-use activities covered by the proposed special rule would be associated with an approved NCCP plan prepared in consultation with the Fish and Wildlife Service under the State of California Natural Community Conservation Planning Act of 1991. These NCCP plans must meet the standards for allowing incidental take of a federally listed species under section 10 of the Act. The approval process for a NCCP plan would involve review and formal concurrence by the Fish and Wildlife Service that the standards set under section 10 of the Endangered Species Act have been met. The proposed special rule will be finalized upon adoption of the Panel's planning guidelines by the California Department of Fish and Game and the Fish and Wildlife Service.

The proposed special rule provides recognition to the State of California's efforts to conserve the coastal California gnatcatcher and the coastal sage scrub community by allowing them to take a lead role in conservation planning in the State. By participating in the NCCP, counties, cities, land management agencies, and private landowners can work together to develop a coordinated comprehensive conservation planning effort, much larger in scale than most or all section 10 habitat conservation plans. In addition, some paperwork (e.g., permit application preparation and processing) will be eliminated by using the special rule rather than the section 10 process, thereby, reducing the time involved in approving a conservation plan.

LESSONS LEARNED

Over the last decade, the Service's expertise in HCPs has greatly increased, as a result of the interest in HCPs in California, Nevada, Texas, and Florida. We've learned quite a few lessons over this period. There are at least 6 concepts and principles worth discussing.

1. HCPs must be linked to the species' recovery needs.

An HCP is not a "recovery plan." Recovery plans delineate the actions necessary to reclassify a listed species from an endangered to a threatened species or to remove a species from the endangered and threatened list. HCPs detail site-specific conservation activities necessary to minimize and mitigate for take of listed species.

A conservation plan should not propose to undertake activities or mitigative actions contrary to the actions identified in

recovery plans. Rather, the conservation plan should complement the recovery plans by focusing on those recovery actions that may be appropriate for the given portion of the listed species' range affected by the proposed permit. A conservation plan often can serve as a significant component of a recovery plan and, thus, can assist in the species' reclassification or removal from the endangered and threatened species list.

2. HCPs should consider non-listed species (Federal candidates or State-listed).

Although the regulatory mechanisms of Sections 9 and 10 focus on species formally designated by the Secretary of the Interior as endangered or threatened, the failure of an applicant to address non-listed species may interfere with timely processing of permits.

If a species is listed before the completion of the process, the issuance of the permit may be delayed. If a wildlife species is listed after permit issuance, a modification of an existing permit or an additional incidental take permit may be required, causing development to be halted indefinitely while an amendment is processed -- unless the species was already addressed in the plan.

3. HCPs covering large areas facilitate a more comprehensive and coordinated planning effort.

Large plan areas allow the applicant to address and analyze a wider range of factors affecting species. Such plans also provide the best opportunity to embrace, within the conservation planning framework, the maximum number of development proposals that would result in take of listed species. Moreover, large plan areas maximize the options available for conserving or enhancing habitat, thus increasing the flexibility to develop adequate mitigation for proposed activities. This is especially true when a conservation plan addresses the entire range of one or more species.

4. Steering committees are vital.

One of the greatest impediments to finalizing a large-scale HCP is reaching consensus among the multiple parties involved. To help build this consensus, applicants often designate a conservation planning authority, known as a "steering committee," to alert all affected interests to the existence of potential Section 9 conflicts and invite their participation in the conservation planning process.

Steering committees often include local, State and Federal agencies, the environmental community, the building industry,

landowners and other interests as appropriate, such as agricultural, recreational, mining, etc. The Service's role on the steering committee is chiefly that of advisor to the applicant and committee on the Section 10(a)(1)(B) process, but has evolved over time. The Service is now placing greater emphasis on facilitating these consensus efforts. Because it may imply that the Service has "pre-approved" a conservation plan, the Service avoids being a voting member of the steering committee.

5. Applicants should apply the NEPA process early in the HCP development.

Applicants often consider the NEPA process just prior to the filing of the permit application. While many recognize that the Service is responsible for compliance with NEPA, often they do not fully understand that NEPA is a time-consuming process. Late attention to the NEPA process delays permit issuance because vital time must be spent by the Service to initiate the NEPA process while the permit application languishes. Consideration of NEPA up-front can streamline the process. For example, where an EIS likely will be needed, scoping meetings should be held early in the development of a conservation plan.

6. HCPs can be expensive for landowners in some cases.

Expenses associated with the development and implementation of plans often slow large-scale planning efforts. Because the applicant is responsible for developing the HCP and submitting it with his Section 10(a)(1)(B) permit application, consultants, scientists and other specialists often must be hired to conduct studies, draft documents and serve other functions in the process. The applicant must also ensure that the final plan includes a mechanism for ensuring the necessary future funds to implement the mitigation measures and other aspects of the plan.

Addressing these funding needs and reaching consensus on them can be a major issue for applicants.

THE FUTURE

As this program proceeds in addressing development conflicts and gains acceptance as a recovery tool, issues surface that highlight the need to make the process more effective and efficient. The process has considerable potential to assist in the recovery of threatened and endangered species and to possibly eliminate the need to list certain candidates; therefore, the Service has an interest in improving the process to make it an attractive option for landowners.

Increasing Role of the Service -- The Service had a minimal role in development of early HCPs largely due to concerns over conflict of interest. Because the Service Director was responsible for approving or denying the HCP, Service staff were uncomfortable with taking an active role in its development. However, over time, the Service has witnessed the tremendous potential this process has for conserving habitat and species in developing regions of the country while also allowing for human needs, and has recognized the extreme importance of playing a greater role to ensure the success of the process.

In the last four years, the Service has become more involved in helping potential applicants determine whether an incidental take permit is needed for various development activities, what the scope of the permit should be, who the appropriate applicant should be, who should be involved in the steering committee, or whether such a committee is necessary, ensuring that adequate biological information is obtained and considered, and recommending and evaluating various mitigation strategies.

The Service also aids in ensuring that the HCP development process, the NEPA process and the Section 7 consultation process are progressing concurrently to ensure that all three "trains" arrive at the station at the same time. An extremely critical role of the Service is to act as a catalyst and facilitate the process -- particularly to encourage participation and representation of affected parties and to intervene if the effort starts breaking down. These functions make Service personnel key players in the planning process.

The degree to which the Service becomes involved in an HCP varies depending upon the size and complexity of the plan and the initiative of planning participants. The Service remains flexible depending upon the need.

A related responsibility the Service has in ensuring that the HCP process remains a conservation asset is to make every effort to expedite the development of recovery plans for listed species that occur in areas that are likely to develop HCPs. This priority has been reflected in the Service's budget allocation process. The existence of a final and current recovery plan provides the greatest assurance that an HCP complements the comprehensive recovery strategy for listed species.

Support to Small Landowners -- The Administration recognizes the financial and resource challenges facing small landowners when developing HCPs and is looking at ways to assist these landowners. In the FY 1994 budget amendment sent to Congress a few months ago, the Administration proposed \$2.5 million, to

be matched by the National Fish and Wildlife Foundation, to be directed at two main program areas -- coastal sage scrub conservation efforts and a study of habitat conservation incentives for private landowners.

The Administration believes that a future initiative under the Endangered Species Act will be to help non-federal land managers and landowners become partners in the conservation of candidate and listed species.

Thank you again, Mr. Chairman, for the opportunity to testify. We will be evaluating all of these alternatives as we develop our specific position on reauthorization of the Act. I will be happy to respond to questions.



ADDRESS ONLY THE DIRECTOR
FISH AND WILDLIFE SERVICE

United States Department of the Interior

FISH AND WILDLIFE SERVICE
WASHINGTON, D.C. 20240



In Reply Refer To:
FWS/TE/93-2390

AUG 27 1993

Honorable Gerry E. Studds
Chairman, Subcommittee on Environment and
Natural Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your July 9 letter requesting that I respond to questions submitted by Congressman Tauzin to the Subcommittee on Environment and Natural Resources. The responses, which are enclosed, supplement testimony on Habitat Conservation Plans that I presented to the Subcommittee on June 16, 1993.

I hope the information provided is helpful to you. If I can provide additional information or assistance, please let me know.

Sincerely,

Mary M. Kaufman
for
Michael J. Spear
Assistant Director for
Ecological Services

Enclosure

**RESPONSES TO QUESTIONS SUBMITTED BY CONGRESSMAN TAUZIN
ENDANGERED SPECIES ACT - HABITAT CONSERVATION PLANS
JUNE 16, 1993, HEARING**

1. You stated in your testimony that the Service has approved 16 habitat conservation plans (HCPs) and issued 26 incidental take permits since the 1982 amendments were made to the Endangered Species Act.

How many section 7 consultations have occurred in this same time period?

Response: The Service first issued an incidental take permit under section 10 of the Endangered Species Act in 1983. As stated in the testimony, to date, the Fish and Wildlife Service (Service) has issued 16 permits and 10 amendments, denied one application, and is currently either reviewing or providing technical assistance on approximately 95 HCPs.

The Service has compiled cumulative section 7 records since Fiscal Year 1987. Between FY87 and FY92, the Service completed close to 2,700 formal consultations. During that same time, the Service issued 14 incidental take permits and 7 amendments to permits under section 10.

How many incidental take statements have been issued to federal agencies as a result of these consultations?

Response: The Service has not tracked nationally the number of incidental take statements issued under section 7. Currently, the Act requires an incidental take statement only when take is anticipated for listed animals. However, the Service has determined that, for consistency, an incidental take statement will accompany all biological opinions and is developing guidance to that effect.

Why the discrepancy?

Response: The incidental take provisions of section 10 are relatively new compared to the provisions of section 7, and the Service's workload in section 7 has been greater than its section 10 workload. However, this is changing rapidly in many areas of the country, such as California, Florida, and Texas where private activities are increasingly affecting endangered and threatened species.

Why are private landowners who do not require a federal permit subject to such a tougher standard than federal agencies and landowners requiring permits?

Response: The Service agrees that the standards under section 10 may appear to be tougher than those under section 7. Under section 7, the Service provides reasonable and prudent measures in a biological opinion to Federal agencies to enable them to minimize incidental take within the project area, while section 10 requires private parties to minimize and mitigate impacts of incidental take. However, the affirmative responsibilities of section 7(a)(1) and measures agreed to through informal consultation may result in mitigation of adverse impacts by Federal agencies also.

In addition, the perception that section 7 is quicker than section 10 results in part from comparing only the time required to complete section 7 consultation for Federal agencies to the total time for obtaining an incidental take permit for private parties. Federal agencies may have been in informal section 7 consultation with the Service and completed their National Environmental Policy Act compliance by the time formal consultation is initiated.

Finally, section 7 requires Federal agencies to "confer" with the Service when an action is likely to jeopardize a proposed species. There is no parallel requirement for private parties under section 10.

Do you think the current process encourages landowners to come to the Service and tell them they think they have an endangered or threatened species on their property?

Response: The processes of sections 7 and 10 of the Endangered Species Act have often been avoided out of uncertainty and fear, usually resulting in unnecessary conflict and delays. The processes of both sections 7 and 10 have worked and will continue to work to resolve endangered species conflicts when initiated early in project planning. The Service recognizes the perception that many private landowners have of the Endangered Species Act and is looking for incentives to assist them in conserving threatened and endangered species. In the FY94 budget amendment sent to Congress a few months ago, the Administration proposed that \$2.5 million, to be matched by the National Fish and Wildlife Foundation, be directed at two main program areas -- coastal sage scrub conservation efforts and a study of habitat conservation incentives for private landowners.

2. On the average, how long does it take to develop a HCP and how much does it cost the private landowner?

Response: The Service has not done an analysis of the average cost and time required to complete a HCP. The costs and amount of time involved in the development of HCPs varies greatly, depending on the size of the project,

number of species involved, impacts to the species, landowner's schedule, and whether the landowner chooses to hire consultants, scientists, or other specialists.

How much does the federal government typically spend in time, manpower and money to process and implement the average HCP?

Response: This depends on how complete the HCP is when the Service receives the application. Depending on the complexity of the HCP and the applicant's willingness to assist the Service in compliance with the National Environmental Policy Act, it can take anywhere from a few to several months to process an HCP. The Service is continuing to work to improve and streamline the section 10 process.

Does the government provide financial incentives to private landowners to participate in these plans?

Response: In certain instances as directed by Congress, the Service has provided funding to assist HCPs in southern California; Travis County, Texas; Brevard County, Florida; and Washington County, Utah. However, in most instances those that benefit from a developmental activity that results in "take" of endangered species have borne the cost of developing and implementing conservation plans for the effected species. This is often done by assessing a per unit development fee which funds habitat conservation planning, habitat acquisition, and operation and maintenance of conservation areas. Incentives have been provided as "start-up" funds to local communities until assessments can fund the remainder of plan development and implementation.

3. Under the present law, the process and procedures for developing HCPs are not well-defined. The Service has substantial discretion over the HCP process as shown by the following:

- (1) The Service has the discretion to simply refuse to process a HCP application;
- (2) The Service may delay processing indefinitely as the law provides no time frame for the development and approval of HCPs.

What changes do you think could be made in the law to ensure private parties that the Service will process the HCP in a timely and cost-effective manner?

Response: The Service is preparing guidance for incidental take permit processing and habitat conservation planning which will help to better define the process and procedures. Delays often result from a lack of understanding of the substantive and procedural requirements of a habitat conservation plan and permit application. We believe that the guidance will go a long way to

improved understanding and fewer delays. You are correct that the present law does not provide specific time frames for completing habitat conservation planning. The Service will continue to use all administrative options to more expeditiously process permit applications and streamline the National Environmental Policy Act process, and is not prepared to recommend changes in the law at this time.

4. The Service appears to have had success recently in processing HCPs and issuing permits for specific capital intensive projects (i.e., shopping centers, urban landfills, residential subdivisions, etc.). These proposed projects make the land involved highly valuable and the owners appear more able to afford the high cost in time and money to go through the HCP process. However, the fact that so few farmers, ranchers, timberland owners, and small property owners have been able to successfully go through the HCP process and obtain a permit suggests that changes must be made to the system.

Am I right in this analysis that the HCP process is working better for individual development projects than it is for activities involving rural land and for landowners who are engaged in repetitive activities that do not require great capital expenditures?

Response: The Service has issued permits and continues to provide technical assistance to numerous small landowners. However, in general, the Service agrees that HCPs covering large areas facilitate a more comprehensive and coordinated planning effort. Large plan areas allow the applicant to address and analyze a wider range of factors affecting the species and maximize the options available for conserving or enhancing habitat. This increases the applicant's flexibility to develop adequate mitigation for proposed activities. Local governments such as cities and counties can play a key role in representing several individual landowners in these efforts. The Service believes that the process can work for individual farmers, ranchers and timberland owners in this manner, and is receptive to all suggestions to improve the section 10 process for small landowners.

5. Do you think the current HCP process is a viable option for small private landowners and businesses?

Response: Yes, especially when several landowners cooperate in a city-wide or county-wide planning effort. Preferably, the Service would work with all landowners, as we did with Georgia-Pacific, to avoid the need to develop an HCP, by avoiding "take" altogether. In this case, Georgia-Pacific found that it could modify its timber management practices so that they would not affect red-cockaded woodpecker colonies on 4 million acres of land. After entering into a management agreement with the Service to maintain this "no take" situation, the company or an individual has no need to enter into an HCP.

6. Does the Fish and Wildlife Service have an adequate number of staff trained in and dedicated to the processing of HCPs? If not, could you estimate the number of staff still needed, the kind of training needed, etc?

Response: The Service believes that requested FY 1994 funding (an additional \$1 million for Service HCP needs) will allow for adequate staff to meet our current workload in habitat conservation planning. As previously stated, the Service expects to complete guidance on habitat conservation planning by the end of 1993. In addition, workshops are planned in several Regions to train Service biologists about HCPs.

7. Mr. Studds has introduced legislation that would extend section 7 protection to all candidate species.

How many species are currently on the candidate species list?

Response: An estimated 3,800 species are currently classified as candidates by the Service. This number is comprised of about 350 category 1 species and 3,450 category 2 species. Only category 1 and 2 species are considered candidates by the Service.

Do you believe mandatory statutory protection of all of these species is warranted and wise?

Response: The Service is committed to listing category 1 species in an expeditious manner and encourages Federal agencies to give category 1 species as much attention as possible. Often attention given to category 1 species can obviate the immediate need to list the species. The Service has entered into conservation agreements with various Federal agencies and private entities toward this end. Dealing with the conservation needs of species before they need listing allows for more flexibility in the management of the species, reduces conflict, and can be more cost effective.

How does a species become placed on the candidate species list?

Response: Species are placed on the list based on recommendations from the public, other Federal and non-Federal agencies, and our own biologists. Evidence must be presented that the species is experiencing significant population declines or threats. The Service publishes the candidate list in the Federal Register and invites public review and comment.

Could you explain the difference between category 1, 2, and 3 candidate species?

Response: Category 1 is defined as taxa (species, subspecies, vertebrate populations) for which the Service has on file enough substantial information on biological vulnerability and threat(s) to support proposals to list them as

endangered or threatened species. Proposed rules have not yet been issued because this action is precluded at present by other listing activity. Development and publication of proposed rules on category 1 taxa are anticipated in the future. The Service does encourage other Federal agencies to give consideration to such taxa in environmental planning.

Category 2 is defined as taxa for which information now in the possession of the Service indicates that proposing to list as endangered or threatened is possibly appropriate, but for which conclusive data on biological vulnerability and threat are not currently available to support proposed rules. There are no plans for proposing these species unless additional supporting information becomes available.

Category 3 is defined as taxa that once were considered for listing as threatened or endangered but are no longer under consideration as candidates for various reasons such as lack of threats, possible extinction, or taxonomic reclassifications (i.e., not considered a species under the Endangered Species Act).

Do we have sufficient scientific evidence to merit immediate listing and protection of all of these species?

Response: The Service has sufficient scientific evidence to list only category 1 species as stated above. The protection of candidate species, as previously stated, may obviate the need for listing them as threatened or endangered in the future.



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**STATEMENT OF JOHN C. SAWHILL
PRESIDENT AND CHIEF EXECUTIVE OFFICER
OF THE NATURE CONSERVANCY**

**on Habitat Conservation Planning Under
Section 10(a) of the Endangered Species Act**

**Before the House of Representatives
Merchant Marine and Fisheries Committee**

June 16, 1993

The Nature Conservancy is an international non-profit conservation organization dedicated to preserving the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and water they need to survive. We maintain offices in all 50 states of the U.S. and partner organizations in dozens of countries. Our efforts are supported by more than 700,000 individual members and over 800 corporate associates committed to reversing the degradation of the biodiversity and natural resources on which our lives depend.

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Introduction

Mr. Chairman and members of the Committee, good morning. I am John Sawhill, President and Chief Executive Officer of The Nature Conservancy. I appreciate the opportunity to appear before this committee to present and discuss The Nature Conservancy's experience and perspective on Habitat Conservation Planning (HCP) under the Endangered Species Act (ESA).

Since 1973, the ESA has clearly defined the duties of the federal government with regard to activities that incidentally take protected species. These duties are embodied in Section 7, which requires consultation with the Fish and Wildlife Service for federally authorized actions and activities on public land that potentially affect protected species. Until 1982, no such mechanism existed to reconcile economic activity with survival of protected species on private land. In recognition of this great need, Congress in 1982 authorized the planning and permitting process under Section 10(a) that has come to be known as HCP. The intent was to allow creation of conservation strategies tolerating the loss of a few individuals of a protected species in exchange for beneficial activities -- including habitat protection -- with secure funding that at a minimum offset the proposed loss.

The Nature Conservancy has been involved in Habitat Conservation Planning since Section 10 was authorized. We have played a significant role in three regionwide planning processes -- Coachella Valley CA, Balcones Canyonlands TX, and Clark County NV -- and are currently involved in several highly innovative HCPs that are exploring bold new mechanisms to balance economic activity with the conservation of endangered species. We are also active in the Natural Community Conservation Plan for the California coastal sage scrub, an effort that goes beyond species based planning to include an entire imperiled community of species. Our experience has revealed the usefulness and potential of HCPs. It has also revealed areas where improvements would help HCPs fully realize that potential. I would like to describe TNC's work and offer some thoughts on the future of HCPs.

Overall, we believe HCPs are and have been a useful way to resolve conflicts under the ESA. They provide opportunities to build partnerships that explore creative means for accommodating the needs of the private sector. They can be a powerful means to leverage resources into effective conservation action and make the ESA more proactive. And HCPs are one of the few existing provisions of the ESA that encourage ecosystem level conservation. In many cases, HCPs allow planners to address other limiting factors on species survival that would not be possible in the absence of a plan. These include lack of habitat management, gradual habitat degradation, and non-native species problems. In addition, regional HCPs can complement recovery planning, an area in which the Fish and Wildlife Service has had trouble fulfilling its obligations. With such potential, HCPs can satisfy many of the concerns that have been expressed about the Endangered Species Act, as well as help abandon the "train wreck" philosophy of conservation and land use planning that has hindered conservation of biodiversity and caused unnecessary economic burdens.

Although Section 10(a) has been interpreted to allow development of HCPs for individual projects or small segments of a species' range, in authorizing HCPs Congress stressed the benefits of a broad scale planning process. We believe that while the HCPs for single projects are convenient, they cannot offer the same economic and ecological advantages of plans that encompass more of a species' range. For example, project-by-project permitting is unable to effectively evaluate the consequences of incremental habitat loss on a species, and it is enormously costly on a per-acre basis. Range-wide HCPs, on the other hand, enable development to take place in habitat that does not contribute significantly to the viability of a species across its range.

A tremendous advantage of regional HCPs is their ability to provide multi-purpose benefits that reach far beyond conservation of imperiled species. These must be taken into account when evaluating the worth of HCPs as a conservation strategy. Among other values, habitat protection in regional HCPs yields water supply and quality, open space, recreation, investment certainty, air quality, public infrastructure planning and even noise abatement values. Some HCPs have even provided unexpected benefits. For example, the Balcones Canyonlands plan contributed to the solution of the Savings and Loan crisis by purchasing several thousand acres of marginally developable habitat held by the Resolution Trust Corporation. Habitat reserves in the Balcones HCP also protected two tributaries of the Lower Colorado River that are an important drinking water supply for the city of Austin.

Perhaps the most promising aspect of HCPs is that they are built on a consensus process. They create public and private relationships and partnerships that not only enhance conservation goals, but allow significant resources to be brought to the table. At their best, HCPs arise from a negotiation that goes beyond position-based bargaining to uncover and satisfy the real needs of those with a stake in the outcome. Such criteria include the survival and recovery of species, predictability in future land use and investment planning, and consistency in implementation of the ESA. HCPs have the ability to address these and other important issues.

Despite the potential of HCPs to resolve broad land use conflicts, some would undermine them by allowing private landowners the option of direct consultation with the Fish and Wildlife Service under Section 7 on every project, much as federal agencies do. Although on the surface, individual consultations under Section 7 would seem to be a more streamlined process, the difficulties caused by allowing landowners to opt for consultation would far outweigh the benefits. For example, while an HCP is necessitated by the proposed incidental take of a listed species, the threshold for Section 7 consultations is much lower. Simply the *possibility* of take requires consultation with the Service. The perception that Section 7 is somehow preferable to Section 10 has been created by the current ability of private landowners to find a federal nexus for their projects and open consultations once they have reached the Section 10 threshold. They have been able to select the most convenient parts of each provision: a less rigorous threshold and a seemingly quicker permitting process. But if Section 7 standards were actually applied to private projects, landowners would find themselves spending far more time and money consulting with the Service and complying with the ESA than they currently do. This would hardly streamline the permitting process. It would also overwhelm the Service, which does most of the work in Section 7 consultations, and undermine the incentive for ecosystem planning under HCPs.

Section 7 places the responsibility for proposing a solution, and most of the work, largely on the Fish and Wildlife Service, while Section 10 allows local parties to propose a solution that works best for them. Relegating private land issues to Section 7 would take local land use decisions out of the hands of the people affected by them and give that responsibility to the federal government. Few local jurisdictions I am aware of would be satisfied with the Fish and Wildlife Service determining the course of their growth.

Most important, if we seriously consider making Section 7 the sole conservation planning mechanism or the preferred alternative, we should examine whether the standards it advances are ones that will achieve the objectives of the ESA. Section 10 requires that after implementation, the focal species will be no worse off than before the plan, in a sense the "no net loss" of survival probability. But Section 7 simply requires that proposed impacts not place the species in jeopardy of extinction. Section 7 was never intended to be the entire standard for measuring impacts of economic activity. It is not a regulatory mechanism that encourages collaborative planning, and may in fact discourage such planning. Reliance on Section 7 standards for all permitting decisions will in the end exacerbate current problems by furthering the decline of already imperiled species, many of which can afford no additional loss in survival probability.

If Section 7 is not a panacea, the question then becomes: how can we make Section 10 and HCPs a more attractive alternative than they currently are? This is not a new or easy question. Clearly a system of incentives is vital to achieving this goal. Incentives must be based on enhancing certainty and predictability, and making the process of developing HCPs as efficient and economical as possible.

Several of the HCPs The Nature Conservancy is involved in are attempting to address important issues such as increasing certainty and efficiency. One way is by expanding the scope of plans to head off future crises. For example, a regional HCP we are facilitating in Brevard County, Florida, includes all the species of concern in the focal natural community - a total of 64. Elimination of future concerns about development in that habitat provides strong incentive for participation by the private sector. Similarly, the California NCCP is planning for more than 100 species in the coastal sage scrub. The Fish and Wildlife Service recently listed the California gnatcatcher -- a prominent sage scrub species -- as threatened, accompanied by proposed special rules under Section 4 that relieve some of the undue interim burden on land use while at the same time providing incentives to pursue the NCCP.

Currently, Habitat Conservation Planning for candidate species is done largely on faith that when those species do become listed, their needs will be adequately covered. The Service encourages inclusion of non-listed species in HCPs for protected species, but as a matter of policy rather than law. The ESA does not formally authorize permitting such plans for other than the listed species, a fact that measurably reduces the predictability gained from them and may diminish the incentive to pursue them. TNC supports proposals to authorize permitting for candidates, as long as those species are treated for planning purposes as if they were listed, and sufficient information exists to make biologically sound decisions. We believe these measures will greatly increase the proactive approach of the ESA and stimulate further interest in HCPs.

Availability of funding is also a strong incentive for planning. So far, federal appropriations for development of HCPs have been few and far between. From one perspective, landowners whose property still harbors a protected species are perhaps the least responsible for its current predicament. Yet those same landowners are often burdened with much of the cost to develop an HCP. For individual project HCPs, this responsibility is understandable. But for HCPs that encompass a large portion of a species' range, the benefits and costs go far beyond a single landowner. At a minimum, lack of funding has slowed the process down greatly. The idea of a revolving trust fund to provide grants and loans for HCPs is one that The Nature Conservancy supports. We hope it will be authorized and well funded.

I would now like to discuss a number of specific issues relating to Habitat Conservation Planning.

Issues in Habitat Conservation Planning

An HCP requires the successful resolution of several elements. Among them are plan development and negotiation, regulatory compliance, availability and use of biological data, and funding for both the planning process and plan implementation. Combined, they make creating an HCP a complicated endeavor. In addition, several other important factors have direct bearing on the outcome of the planning process. These include the crisis atmosphere

in which HCPs are developed, the role played by the Fish and Wildlife Service and the correlation between HCPs and other mechanisms of the ESA.

A. The HCP Negotiation

Developing an HCP is often the process of creating a positive outcome from chaos and tension. Simply the number of interests involved can present a tremendous management challenge. For broad scale HCPs there are business, development, environmental, landowner, agency, county government, city government, scientific, state and federal interests, all clamoring for satisfaction of their needs. The most important factor in managing such a complex process is facilitation. This is a role The Nature Conservancy has played often, at the request of local governments and other participants.

The facilitator must tackle a tremendous number of tasks related to each phase of planning. TNC has been called upon to provide biological study coordination, administration, meeting planning, fundraising, communication, and public education. The primary issue of concern is that despite the importance of facilitation, few entities can provide the expertise necessary to make a large HCP process operate efficiently. This means that persons creating HCPs must often learn by trial and error and may encounter negotiation problems that unnecessarily lengthen the process.

TNC has learned that the best way to structure an HCP negotiation is to make it as open as possible. In the Balcones Canyonlands HCP in Austin, Texas, one which TNC facilitated, an original group of more than 30 people wished to participate. They were all encouraged to contribute their energies. Eventually, a volunteer executive committee of 17 people representing the affected interests emerged and made most of the decisions about details of the plan. However, no interest was excluded from the process. Individuals and the public at large were provided ample opportunities to participate through a variety of forums.

In Brevard County, Florida, an ongoing HCP we are facilitating for the threatened Florida scrub jay, participants have taken a more active approach to structuring the negotiation. The local government wished to balance the size of the negotiating committee with openness and access to the process. They identified six broad interests: the county; incorporated cities; business; environmental and landowners both with and without scrub jay habitat. The county held a long series of public meetings for each interest, to both select a representative to the steering committee and to establish a group of persons to support and advise their representative. This has resulted in a small but broad central steering committee supported by many active participants and interested parties that communicate at all levels.

With openness and competent facilitation, HCPs can become a process of empowerment and consensus, returning decisions about local land use back to the hands of local communities within the framework of the ESA. The most difficult HCP processes have

resulted from negotiation structures that were contrived or included participants that were hand-picked by higher authorities such as state and local governments.

B. Funding

Funding is perhaps the most difficult aspect of Habitat Conservation Planning and requires the most creativity to resolve. There are two distinct challenges: funding the process and paying for implementation of the plan. In dollars these are generally separated by at least one order of magnitude, but each can present obstacles.

Funding the process may be expensive. Biological studies alone have often cost hundreds of thousands of dollars. Local governments strapped for funds may be hard-pressed to generate sufficient dollars. HCPs have resolved this problem in many different ways. In the Coachella Valley HCP for the fringe-toed lizard, The Nature Conservancy raised \$100,000 to pay for biological studies. In other cases, it is the parties affected by the regulation who have provided funds to pay for the plan itself. The Balcones Canyonlands plan was raised \$650,000 to cover the costs of biology, planning, environmental assessment and economic studies. Only in the last few years has the welcome appropriation of federal funds been received for some HCPs. In Brevard County, Florida, a \$100,000 federal appropriation has so far been the only source of planning funds. The Nature Conservancy, the county, scientists and the citizen steering committee have all contributed volunteer or in-kind services and expertise to the process.

Clearly, if those who have a stake in the outcome of the plan put up the funding for it, they have further incentive to see the process through. But it can slow the process tremendously to spend time seeking planning funds. TNC is greatly encouraged to see the inclusion of a revolving fund to provide grants and loans to local governments developing HCPs in several bills amending the ESA this Congress. A federal revolving fund will be an extremely effective use of limited dollars available for ESA and will go a long way toward addressing the above issues.

Funding implementation of an HCP presents an entirely different challenge. Broad scale plans can cost tens of millions of dollars to implement. Most of this is the cost of protecting and managing land. Some would debate the value of HCPs because of their costs. Our experience leads us to strongly disagree, based on the cost of NOT doing HCPs. The Balcones Canyonlands HCP in Austin, Texas is the only effort to date that has commissioned a significant economic impact study as part of the planning process. Among other things, it showed that the overall land unit cost of the regional HCP was nine times less expensive than compliance with Section 10(a) at the individual or project scale. Remarkably, the study projected population growth in the Austin area with the HCP in place nearly 55 percent greater than without the plan. At least in this case, the regional HCP was clearly more economical. In fact, it appears the plan will stimulate investment and economic growth in the areas outside HCP habitat reserves by providing developments with an 80 to 85% reduction in compliance costs.

Some states have taken a leadership role in providing funds for habitat protection. These measures can have a tremendous positive effect on implementing HCPs. For example, four years ago Florida initiated a program that has generated \$1.2 billion for habitat protection and is expected to provide \$1.8 billion more over the next six years. Called Preservation 2000, this program is funded through bonds repaid by a progressive increase in the state documentary stamp tax on real estate transactions. Several local governments have also passed bonding initiatives, which will generate another \$500 million for habitat protection over the next decade. In addition to acquiring the most sensitive and unique terrestrial and aquatic habitats in Florida, matching funds provided by Preservation 2000 and local bonds will help protect land under HCPs.

Florida's financial situation is quite insecure, and in some respects funding habitat protection is more difficult than in many other states. Florida has no state income tax, yet spends just as much money as other states. People come to Florida to escape taxes, but Preservation 2000 is funded through a progressive tax increase. In addition, more than 60% of the population has lived there less than 11 years and few citizens have personal ties to the state's ecological heritage. But Preservation 2000 receives consistently strong support from both the public and the state legislature. Two years ago, it and an affordable housing measure were the only items in the entire state budget that received new appropriations.

The primary lesson of Florida's experience is that the public has been in favor of significant dollars for land acquisition despite the state's financial problems. By comparison, the federal government has not begun to fulfill its responsibility for funding habitat protection. The \$300 million Florida has annually committed to purchasing land puts in perspective the \$12 million appropriated to states under Section 6 and the \$12 million spent by the Land and Water Conservation Fund last year. It underscores the need for more federal funding for habitat protection under HCPs.

C. The Biology of HCPs

The biological elements of an HCP are perhaps the most important determinants of its long-term success. It is in the best interest of all parties to an HCP that the biological information used to create the plan be of the highest quality and relevance, since much of the certainty achieved by the plan hinges on its biological viability. Unfortunately, in the crisis atmosphere surrounding the development of HCPs, biology is frequently downplayed or minimized.

Some plans rely on very little new biological information for planning. Often, studies that provide information useful to designing habitat reserves are carried out as part of implementing the plan, a dangerous strategy if the assumptions used to design initial reserves are seriously flawed. On the other hand, some HCPs incorporate significant scientific information into conservation planning. The Balcones Canyonlands HCP spent more than a year and substantial funding on biological studies that identified the scientific elements of the plan. Studies are still continuing during plan implementation. The California Natural

Communities Conservation Plan and Brevard County, Florida have both formed scientific review panels to make application of biological data more efficient and practical to the goals of the process.

A logical question is: how much data is enough for planning? In reality the answer depends on the amount of habitat modification contemplated. A plan that proposes to take 50% of the remaining habitat of a species will require significantly more biological information to be successful than a plan that projects minimal impact. Critics frequently argue that we can collect information forever and not guarantee that a conservation strategy will be successful. This is often used as an excuse to abandon science altogether in planning. The real issue, however, is what data are important to designing conservation plans and how to prioritize and make data collection more efficient for planning. In an attempt to find a solution, The Nature Conservancy is currently participating in a project partially funded by the National Fish and Wildlife Foundation that will develop workable guidelines for the application of biological data to HCPs.

D. The Scope of an HCP

HCPs are one of the only mechanisms in the ESA that provide for ecosystem conservation. Deciding what species, activities and land areas to include in an HCP, therefore, is an important question. A broad scope provides greater future predictability in land use as well as greater assurance that the species will remain viable. This must be balanced against complexity and cost, however. Our experience has shown that while presenting many more challenges, HCPs that include groups of ecologically related species (such as natural communities) and as much of the species' range as possible provide the greatest ecological and economic benefit.

Since the first plan for the mission blue butterfly in San Bruno Mountain, California, HCPs have begun to include most or all of the listed species in an area. Many have also considered candidate species, on faith that adequate planning will avoid future problems. The Balcones Canyonlands HCP covers two listed migratory birds and five protected cave invertebrates, as well as 36 candidate species. Brevard County's HCP encompasses 64 species, most of which are candidate plants. So far, however, the predictability afforded by planning for candidate species has been minimal because the ESA does not currently authorize permitting conservation plans for unlisted species. Several bills this Congress would authorize permitting HCPs for candidate species and in our opinion greatly improve the HCP mechanism.

California has taken the concept of multiple species planning one step further. Under the California Endangered Species Act, the legislature authorized a planning process for an entire natural community throughout its range. The NCCP process seeks to develop a model for reconciling the dramatic growth of Southern California with the survival of the coastal sage scrub. Importantly, planning at the ecosystem level will not be at the expense of or in conflict with the needs of more than 100 rare sage scrub species. Many, such as the

California gnatcatcher and the coastal cactus wren, require special attention to achieve long-term conservation goals. We believe the focus of NCCP on natural communities composed of many interdependent species is the future of conservation planning.

E. Integrating HCPs and Recovery Planning

Coordinating HCPs with the rest of the ESA is important to effectively achieve the Act's goals. The most important opportunity for this lies in recovery planning. Planning for the recovery and delisting of species is one of the Fish and Wildlife Service's primary obligations, yet the Service has had difficulty both drafting and implementing recovery plans. Recovery plans that do exist are plagued by lack of funding. There has been very little attention paid to the role HCPs could play in improving this process. Based on TNC's experience, we believe a greater effort should be made to link regional HCPs and recovery planning, perhaps in some cases even letting HCPs be the engine that drives the recovery process.

At a minimum, the Service should draft recovery plans with attention to how HCPs fit into the picture. The Service has made some steps in this direction. For example, field staff in Florida were faced with a recovery plan for the Florida scrub jay that was by their own admission nearly useless to recovering the species and providing guidance to HCPs. Recognizing the need for coherent guidelines for conservation planning, the Jacksonville Field Office assembled a team of scientists to draft "Statewide Guidelines for Florida Scrub Jay HCPs." This framework defines the biological parameters for conservation planning over the species' entire range, and sets clear standards that HCPs can target. In many respects, these guidelines will serve as a surrogate for a recovery plan.

At best, HCPs can greatly assist recovery efforts with the partnerships they foster and the resources those relationships bring. Recovery plans are frequently criticized for their apparent lack of consideration for the costs and problems of implementation. Partnerships in the planning stages may help overcome this stumbling block by allowing the Service a more realistic view of the necessary steps to recover a species and by helping to generate the necessary funding from multiple sources to successfully carry out their plans.

Conclusion

I hope this testimony has helped demonstrate that HCPs are a powerful existing means to reconcile economic and ecological issues under the ESA. Although I have identified a number of areas for improvement, most of these are simply strengthening and enhancing an already useful process.

Perhaps the most important point from this discussion is that HCPs can be a way to abandon the crisis philosophy of conservation and land use planning that hinders implementation of the ESA and conservation of biodiversity. They are a means to make the

ESA address ecosystems better, as well as make the law more proactive. Best of all, HCPs bring together landowners, governments and conservationists to find solutions that make environmental permitting more economically efficient while protecting the irreplaceable species and ecosystems that are our natural heritage.

I appreciate the opportunity to share The Nature Conservancy's views, and would be pleased to answer any questions you may have.



John C. Sawhill
President & Chief Executive Officer

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JUL 29 1993

July 27, 1993

The Honorable Gerry Studds
Chairman, House Merchant Marine
and Fisheries Committee
1334 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Studds:

Please find enclosed my response to the questions you forwarded to me from Congressman Tauzin regarding the Subcommittee's June 16 hearing on Habitat Conservation Plans.

I appreciate the opportunity to express The Nature Conservancy's positions on these issues.

Best regards.

Sincerely,

A handwritten signature in black ink, appearing to be "J. Sawhill", written over the word "Sincerely,".

Attachment

cc: Congressman W.J. Tauzin

**Answers to Questions Submitted for the Record
by Congressman Tauzin to
John Sawhill, President and CEO of The Nature Conservancy**

- 1. What is your position on private property rights? Do you think private landowners who are lucky enough to find an endangered or threatened species on their property should be called upon to shoulder the lion's share of mitigation responsibility or should it be more evenly distributed?**

The Nature Conservancy respects absolutely the private property rights of landowners, and, as owners of more than 800,000 acres, The Nature Conservancy understands the constraints under which private property owners operate. Because of these issues, The Nature Conservancy supports a broad-scale ecosystem approach to conservation. This method helps not only to get ahead of the extinction curve and protect the long-term viability of threatened and endangered species, but also to distribute any burdens caused by the provisions of the Endangered Species Act.

- 2. Do you think private landowners should be compensated if they are unable to obtain a permit and lose substantial economic use of their land?**

The issue of compensation is one which The Nature Conservancy is aware has been and will continue to be litigated in this country. The Conservancy has not -- nor will it -- become involved in any of this litigation and does not have a position on the compensation issue. The Conservancy works in a spirit of cooperation and partnership with willing sellers. As private landowners ourselves, we pay the market-driven value for the land we purchase. Within any given ecosystem, there will be a number of landowners who want to sell their property or manage it in a way that protects the threatened and endangered species that are on the property; we have spent over forty years helping these landowners do just that.

- 3. a. Although you have stated in your testimony that the Balcones Canyonlands Conservation Plan has the support of landowners in the Austin area, isn't it true that many small landowners do not support the Plan and feel that they were left out of the process? b. Was a private landowner on the Committee that drafted the plan? c. If so, how long? How long was the Committee in existence? d. How long did it take to draft the plan?**

a. The Nature Conservancy feels there is strong support for the Balcones Canyonlands Conservation Plan (BCCP), including among small landowners. This view is supported by a 1993 survey of the attitudes of western Travis County landowners on endangered species issues conducted by the Texas Agricultural Extension Service for the Travis County Commissioners Court. The survey found that a revised BCCP was preferred by more small landowners (less than 10 acres) than any other alternative approach to comply with the Endangered Species Act.

With regard to small landowners' participation in the process, since the beginning of the BCCP process, several hundred individuals -- including dozens of small, intermediate, and large landowners representing the vast majority of acres in the BCCP area -- have presented hundreds of hours of comments and testimony on the BCCP to the volunteer Executive Committee, the State Legislature, the Austin City Council, and the Travis County Commissioners Court. In addition, the Executive Committee created a Landowners Committee in the summer of 1991 that held numerous meetings with both individuals and groups of private landowners to solicit their input prior to February 1992.

b. Yes, many private landowners were on the BCCP Committee which drafted the plan. The volunteer BCCP Executive Committee consisted of seventeen members representing government, business, environmental organizations, and individual landowners. More than one-half of the Committee members actually owned homes and resided within the BCCP planning area. In addition, business delegates to the Committee (including two attorneys, a land planner, and a home builder association official) represented the interests of private landowners on the Committee. These individuals represented clients who owned private property ranging from tens of acres to thousands of acres in the BCCP area. Finally, two individuals representing their personal ownerships of 144 acres and 496 acres, according to County tax records, served on the Executive Committee.

c. The Executive Committee was established in October 1988 and completed its work in February 1992. With the exception of the two individuals that represented their personal ownerships, all private landowners and their representatives served on the Committee from October 1988 to February 1992. The two landowners representing their personal ownerships were invited to participate on the Committee in December 1991 and served through February 1992.

d. Work on the biological studies for the BCCP began in October 1988. The first draft of the plan was presented to the Executive Committee in January 1991, and a final draft was presented in February 1992. This draft plan was, in turn, forwarded for finalization and official adoption by the four local and state government agencies that will apply for the Section 10(a) permit. The plan, including the federally required environmental impact statement, is scheduled for completion in January 1994.

4. Do you believe that the Section 10 process is a viable option for small private landowners? If yes, why? If no, how can the process be improved to address this problem?

Carried out as Congress intended, The Nature Conservancy believes the Section 10(a) process is a viable option for small private landowners under the Endangered Species Act. For example, the regional ecosystem Habitat Conservation Plan in the Balcones Canyonlands area of Texas, has been proven through several detailed economic studies to be the most economical alternative for private landowners in a setting where many are vying for land development permits. Not only is it more efficient than every individual attempting to

comply with the ESA alone under any mechanism, but also the unit cost of compliance is dramatically reduced. The official economic study of the HCP showed that participation in the plan by small landowners reduced their financial obligation of compliance by 85%. For this reason, a survey by the Texas Agricultural Extension Service and Travis County showed that the HCP was supported by more small private landowners within the planning area than any other alternative under the ESA.

TESTIMONY

Submitted by

THE NATIONAL ASSOCIATION OF HOME BUILDERS

to the

MERCHANT MARINE AND FISHERIES

SUBCOMMITTEE ON

ENVIRONMENT AND NATURAL RESOURCES

of the

U.S. HOUSE OF REPRESENTATIVES

on

HABITAT CONSERVATION PLANNING

JUNE 16, 1993



National Association of Home Builders

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**STATEMENT FOR THE RECORD
 submitted by
 THE NATIONAL ASSOCIATION OF HOME BUILDERS
 to the
 MERCHANT MARINE AND FISHERIES
 SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
 of the
 U.S. HOUSE OF REPRESENTATIVES
 on
 HABITAT CONSERVATION PLANNING**

JUNE 16, 1993

Mr. Chairman and Members of the Subcommittee:

Good morning, my name is Ed Sauls. I am president of the Sauls Company, a development and consulting firm in Laguna Beach, California and a member of the National Association of Home Builders (NAHB). On behalf of the NAHB's 164,000 member firms, I am pleased to have the opportunity this morning to comment on the Federal Endangered Species Act (ESA), specifically as it relates to habitat conservation plans, commonly referred to as HCP's.

OVERVIEW

NAHB is committed to the preservation of our environment, but is concerned that the approach under the Endangered Species Act (ESA) does not balance environmental protection with socioeconomic concerns. Many believe that it is not possible to achieve such a balance, but NAHB disputes that position and strives to achieve such an end. Reforming habitat conservation planning under the ESA will be instrumental in moving toward achieving that balance. This statement will highlight specific ways in which HCPs can truly accomplish their original goal of species preservation while eliminating the conflicts that we have come to expect from the protection process.

GENERAL CONCERNS AND SUGGESTED ACTIONS

Implementation of the ESA has increasingly generated conflict between species protection and other land uses. To date, 792 species are listed as threatened or endangered and another 3500 are proposed for listing. As we try to protect each species, builders become inundated with trying to comply with confusing regulations. Although HCPs offer the landowner a remedy to some of the land use

restrictions, they are generally reactive, too narrowly focused, expensive and time consuming.

Under section 10(a), permits can be issued for the incidental "taking" of a listed species that occurs in conjunction with an otherwise lawful activity being done in accordance with an approved HCP. This provision allows the landowner a potential safety net from some of the ESA development restrictions, however very few 10(a) permits are actually issued and many HCPs remain stuck in the pipeline. Between 1983 and 1991, only seven 10(a) permits for listed species have been issued nationwide and Region I reports that more than 70 HCPs are currently in the approval process. 10(a) permits are not always needed, but it is evident that the current HCP process is not adequately resolving the conflicts as needed and the protection for a tremendous number of species still needs to be addressed.

Planning must be done prior to the listing of a species and address multispecies conservation. Currently, HCPs typically address only small numbers of species which have already been listed. In addition, after a species is listed, the planning process has minimal flexibility, thus hindering both species protection and development. Conflicts between urbanization and species preservation need to be resolved before species fall under ESA mandates. Prior to listing and federal restrictions, a much greater level of flexibility exists to meet both wildlife requirements and development needs. Early planning can enable limited financial resources to be set aside for definition and acquisition of wildlife preserves, and critical corridors between preserves can be accommodated more readily if planned for in advance of development.

Besides their narrow definition and reactive nature, HCPs are very expensive and time consuming. Funded by the landowner who happens to own the remaining critical habitat for a listed species, HCPs can cost millions of dollars and take years to process. For example, the Coachella Valley HCP for the fringe-toed lizard cost \$25 million, requiring almost three years to process, and the Riverside County Stephens' kangaroo rat (SKR) cost \$28 million, taking over five years for final approval. The ESA provides no specific deadlines for action, causing unnecessary delays in the process.

Reauthorization of the Endangered Species Act presents a perfect opportunity to address these concerns and examine the use of HCPs. It is essential to examine the role of prelisting and multispecies conservation efforts, deadlines and costs.

To succeed at species preservation, we must encourage prelisting, multispecies programs which provide more flexibility for long term survival of species. Currently, prelisting conservation is more difficult than postlisting conservation

because the landowner's evaluation must include: the costs of planning and processing an agreement with the federal and state agencies; land preservation costs; other mitigation costs; and, the risk that a species will be listed before a legal taking of the habitat can occur. Unfortunately, the landowner often concludes that the costs and risks outweigh the benefits.

In California, for example, two adjacent properties exist for comparison of the risk versus benefits of prelisting conservation. One landowner has expended over 2 million dollars to arrive at a conceptual HCP agreement and will commit total costs in excess of

12 million dollars for the taking of approximately 400 acres. After three years of processing, this landowner still does not have assurances for the taking of the species. On the other hand, the adjacent landowner destroyed approximately the same acreage before a listing for the cost of clearing the habitat and is no longer impacted by ESA. Such examples, therefore, lead landowners to conclude that prelisting HCPs are an expensive and time-consuming burden - strong arguments against proactive conservation.

The necessary encouragement should be in the form of rewards and incentives for prelisting conservation. To improve HCPs and encourage prelisting HCPs, the ESA should be changed as follows:

1. STRENGTHEN PRELISTING HCP COMMITMENTS TO LANDOWNERS.
2. CREATE AN EFFICIENT, TIME-CERTAIN PROCESS FOR HCPs.
3. PROVIDE FINANCIAL INCENTIVES.
4. ENCOURAGE RANGEWIDE NATURAL RESOURCES INVENTORY AND PLANNING.
5. PROVIDE ADEQUATE FWS STAFFING TRAINED IN MULTISPECIES PLANNING, WHOSE PURPOSE IS TO SUPPORT THE PROCESSING OF HCPs.

SPECIFIC ISSUES AND RECOMMENDATIONS

The ESA needs to be revised to strengthen the role of HCPs and improve the 10(a) process. A realistic level of certainty to landowners, an efficient and timely process, financial incentives, rangewide inventories and planning, and an adequately staffed and trained Fish and Wildlife Service (FWS) can greatly improve the potential of early conservation planning.

1. STRENGTHEN PRELISTING HCP COMMITMENTS TO LANDOWNERS

BACKGROUND INFORMATION:

The rules of HCPs are not clearly defined and discount the benefits of prelisting planning. Landowners have significant concerns regarding FWS commitments made at the time of HCP approval, including:

- The FWS may not issue the section 10(a) permit upon listing of a species;
- Mitigation requirements may be increased;

- A species which is not covered in the HCP may be listed.

Such issues, although critical, are insufficiently addressed in current law. Unless each of these concerns is evaluated and addressed, landowners will be motivated toward postlisting conservation.

PROBLEM A: Prelisting Authority for HCPs is Unclear.

Authorization for prelisting conservation planning is included in the Congressional intent language, but it is not expressly stated in the ESA itself. This results in unnecessary confusion, delay and indecision when implementing prelisting HCPs. For example, as recently as last year, one solicitor for FWS was reported to contend that FWS did not have the authority to approve a prelisting HCP while another landowner was operating under an Memorandum of Agreement with the FWS for the preparation of a prelisting HCP.

Under current law, landowners are provided with an agreement that only obligates FWS to issue 10(a) permits for listed species, and those permits are not guaranteed. Additional review of an HCP is triggered when a species is listed and a permit is requested, resulting in potential delay and renegotiation of mitigation requirements. These discussions could then render a project infeasible - a major disincentive for prelisting conservation. A landowner cannot be subject to additional mitigation and be still be motivated to prepare a prelisting HCP.

RECOMMENDATION A: Issue 10(a) Permits Upon Prelisting HCP Approval.

Expressly authorize prelisting 10(a) permits to be provided to landowners at the time a prelisting HCP is approved and prevent additional mitigation from being required.

PROBLEM B: HCPs have been Limited in the Number of Species They Protect.

Prelisting HCPs do not provide a landowner with permit assurance for all species within the HCP boundaries, only those listed. This causes significant problems when a new listing is to be made. Even though the species may live within the boundaries of the existing HCP, it is not covered and results in additional costs and delays to a landowner's project as modifications or a new HCP are done.

The FWS contends that HCPs must be only for those species about which extensive scientific information is known and will directly benefit. Such extensive information is expensive to obtain, so landowners will often base HCPs on estimates as to which species is most likely to be listed before a taking will occur. The standard of "best scientific and commercial data available" is applied to listing decisions and designation of

critical habitat but is not expressly applied to HCPs. The Act should be consistent in order to avoid limited financial resources being wasted on futile scientific data collection.

RECOMMENDATION B: Authorize Habitat Based HCPs and Issue Permits for All Species Within HCP Boundaries.

The ESA should provide that prelisting HCPs shift their focus from individual species-planning to multispecies, habitat-based planning, based on the standard of best scientific information available. A habitat approach to species conservation serves to protect more than just those species listed, as it helps to support a broad range of species populations. In addition, permits should be issued for all species within the boundaries of approved HCPs, assuming all habitat types would be addressed. This will also help to assure landowners that subsequent listings will not adversely affect them.

2. CREATE AN EFFICIENT, TIME-CERTAIN PROCESS FOR HCPs

BACKGROUND INFORMATION:

The time requirements of HCPs are an obstacle to prelisting conservation. The process is very time-consuming, taking many years to accomplish. Unfortunately, the time and expense devoted to processing HCPs can deplete limited financial resources that could have been applied to the acquisition and management of preserves. HCPs require extensive processing time for three major reasons:

- HCPs are considered discretionary, non-mandatory actions that lack processing deadlines.
- Duplication in state and federal permits and process.
- Conflicts in scientific opinions.

PROBLEM A: FWS Considers HCPs to be Discretionary, Non-mandatory Actions.

The ESA discourages HCPs by providing little, if any, FWS staff accountability. The FWS considers HCPs as discretionary actions and can choose to ignore proposed HCPs without recourse by the landowner. Furthermore, the FWS can withhold approval of HCPs without offering any suggestions or alternatives for appropriate conservation measures. In short, the FWS is not obliged to cooperate in the preparation or processing of HCPs. There are no deadlines providing incentives for a FWS employee to expedite the planning process.

RECOMMENDATION A: Establish HCP Processing Time Frames.

Specific time requirements should be set for HCPs that are comparable to those for federal agencies under section 7 that, regarding the taking of species, sets forth non-discretionary considerations and mandatory time limits in which decisions

must be made. This will place HCPs on an equal level of priority within the FWS with section 7 permits and other mandatory, non-discretionary actions.

PROBLEM B: Duplication of Process.

The time-consuming HCP process is exacerbated by the fact that a landowner must meet both federal and state requirements in order to have certainty that he has addressed all conservation issues. Even the Federal National Environmental Policy Act (NEPA) process creates unnecessary duplication. NEPA review is required at the time a prelisting HCP is approved and again when the section 10(a) permit for incidental take is issued once a species is listed. Satisfactory completion of both state and federal processes requires that an HCP:

- (i) meet two separate sets of standards;
- (ii) be processed through two separate agencies;
- (iii) prepare two separate contracts.

Even when these requirements are accomplished, a landowner may not have met all his obligations for wildlife conservation. For example, other federal permits, such as an Army Corps of Engineers permit under section 404 of the Clean Water Act to guarantee wetlands protection, may also be required. The landowner can be overwhelmed by the number of permits required and the inconsistencies of the processes and requirements.

RECOMMENDATION B: Eliminate Duplication, Encourage State and Federal Efficiencies and Facilitate Consultation for Federal Permits.

NEPA and ESA processes should be evaluated for unnecessary duplication, and federal and state agencies should be encouraged to negotiate Memorandums of Agreement (MOA) to eliminate duplication. For example, MOAs should allow flexibility under NEPA to defer to state processes which accomplish similar objectives. In addition, amendments to the ESA should provide that a landowner may, at his option, require a consultation with other permitting federal agencies in order to coordinate the activities under the HCP with other federal permits and obligations.

PROBLEM C: Minor Projects Cannot Justify the Costs of HCPs.

The huge cost of HCPs cannot be justified for relatively small impacts. Section 10 of ESA does not provide a cost-effective process for projects with isolated and degraded patches of habitat, development with minor impacts, or public utilities having minor or temporary impacts. Landowners are encouraged to complete their projects before a listing occurs, or are required to wait until their impacts can be incorporated into a postlisting HCP.

RECOMMENDATION C: Establish an Efficient Process.

An efficient process should be established to coordinate the

approval and mitigation of minor impact projects in support of broader range-wide solutions. This process should also provide the private landowner with efficient general permits and/or consultation as recommended in sections 108 and 304 of H.R. 1490, Mr. Tauzin's ESA reform bill.

3. PROVIDE FINANCIAL INCENTIVES

PROBLEM A: The Costs of HCPs are Placed on Few Persons.

An inequitable problem exists in funding HCPs. As mentioned earlier, the long-term funding for nearly all of the HCPs approved to date comes from private landowners, development fees or exactions, and yet the problem that endangers a species is rarely the result of the HCP proponent. The California gnatcatcher, for example, was listed primarily due to the cumulative loss of habitat. It was estimated that 70% to 90% was previously destroyed from agricultural operations, livestock grazing and urbanization of the area. The problem this presents, however, is that without public funding the burden of preservation is paid for by only 10% to 30% of the landowners.

RECOMMENDATION A: Provide Matching Federal Funds.

Matching federal funds for approved HCPs should be provided. If funds are not available then species should be delisted or the prohibition against that taking should not apply.

PROBLEM B: Multiple Landowner HCPs.

Prelisting conservation planning in areas with multiple owners is extremely difficult. If a plan is available, all landowners within the boundaries of an HCP must weigh the risks and costs against the benefits and decide whether to invest. Any one landowner may prevent the completion of a prelisting HCP through his abstention. The odds are stacked dramatically against the success of multiple ownership HCPs.

These multiple landowner HCPs are often funded in the long term by development fees. These fees are collected through a simple entity and used to acquire land for species preserves. Regardless of who pays for conservation, the establishment of a single buyer for habitat may not be the best long-term funding mechanism. It creates a monopoly and does broadly apply market incentives to conservation.

RECOMMENDATION B: Market Incentives.

The use of market incentives and processes, such as the Habitat Transaction Method, should be encouraged to facilitate landowner cooperation.

4. ENCOURAGE RANGEWIDE NATURAL RESOURCES INVENTORY AND PLANNING

PROBLEM A: Unavailable Range-wide Conservation Goals and Data.

Rangewide biological information is typically not available. Without the proper data, however, conservation goals and objectives are unclear or simply do not exist. Without them, then, the default conclusion is that everything must be protected until more information is known. Indecision by the FWS prevails and plans are delayed.

RECOMMENDATION A: Fund Large-scale Natural Resources Inventory and Planning.

Federally funds and/or to matching local government funds should be available to survey for large-scale, prelisting, multispecies planning and to inventory natural resources. This type of planning, based upon the participation of affected local jurisdictions and landowners, should accomplish the following:

- (i) consider cost effective alternatives for implementation in landowners' conservation plans;
- (ii) create accurate range-wide biological data;
- (iii) should result in clearly defined conservation goals.

This type of approach would be the most cost-effective. FWS personnel would benefit from having improved biological information and clear conservation goals on which to base their HCP decisions. Landowners would then have more predictability as to their project's possible impact, design, mitigation costs, and the potential for an acceptable HCP.

5. PROVIDE ADEQUATE FWS STAFFING TRAINED IN MULTISPECIES PLANNING, WHOSE PURPOSE IS TO SUPPORT THE PROCESSING OF HCPs

PROBLEM A: Inadequate FWS Staff-time, Training, and Motivation.

There is very little FWS staff time or motivation to process

an HCP. An attitude sometimes prevails among staff that development is the adversary rather than the vehicle to accomplish conservation. Another presumption often projected by FWS staff is that everything must be protected. Apparently it is more difficult for the FWS to approve destruction of habitat in isolated or degraded areas than to achieve a large scale, long-term preserve elsewhere. The result, however, is a time-consuming process which is producing random, isolated preserves that accomplish very little for wildlife.

RECOMMENDATION A: Provide Adequate FWS Funding.

Funding should be provided for adequate FWS staffing,

training, legal counsel and management necessary to work exclusively on processing HCPs.

CONCLUSIONS

In summary, HCPs are costly and time-consuming. Many unresolved problems have been created by the current ESA. Only substantive changes to the ESA through significant incentives will result in effective prelisting conservation, and, ultimately, greater preservation of species.

Incentives to Encourage Prelisting Conservation
Comparison of Motifvells and Recommendations
June 16, 1993

Page 1

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Subject	Current Prelisting	Postlisting	Recommended Prelisting	H.R. 2043 (Studda)	H.R. 1490 (Tuzin)	Comments
1. PERMITS						
A. Prelisting permit						
	Negotiated agreement with few precedents. Only FWS to issue permit to landowner.	Permit is specific.	Confirm prelisting authority in law. Secure actual permit. Prelisting HCP is approved.	Authorizes the development of HCP's for candidate species and provides authority to Secretary to issue permits for HCP's. Upon listing of a species included in plan, and upon further review by Secretary, permit is treated as a § 10 incidental take permit.	Clarifies that HCP's developed pursuant to § 10 may apply to non-listed species. Secretary may issue permits for HCP's for species included in plan. Also clarifies that Secretary has authority to issue permits for HCP's (which would serve as an alternative permit to § 10 permits) for the conservation of listed and/or non-listed species with states, local governments and private landowners as binding alternatives to further listing, RP or consultation requirements. CMA governs administration and management of habitat. CMAs may be issued only upon noncompliance or absent corrective action.	Landowner needs to be assured of a permit to the maximum extent possible. Approved HCP's should be issued from further changes to the maximum extent possible.
B. Multispecies, habitat based	Limited multispecies assertions. Each species is listed separately, not on a habitat basis. Requires very direct benefit to a species. Non-benefit species permit assertions is unclear.	Same as current prelisting.	Provide 10(a) assertions for all habitat regions, including benefitting and non-benefitting species. Also clarify that decisions are to be based upon best available information.	Authorizes Secretary to provide assurances for the development of HCP's for non-listed species included in plan to be treated as § 10 permits upon listing and after further review by Secretary.	CMAs may apply to species proposed for listing and non-listed species. CMAs may be issued upon RP and consultation requirements while CMA in effect.	Business disruption in the event of a listing is a major factor. Prelisting HCP's should provide permits for the take of all species, based upon habitat, not species by species conservation.

Incentives to Encourage Prelisting Conservation
Comparison of Motivations and Recommendations
June 16, 1993

Subject	Current Prelisting	Postlisting	Recommended Prelisting	H.R. 2043 (Studds)	H.R. 1490 (Teuzin)	Comments
1. PERMITS						
B. (continued)					§ 10 HCP's may apply to any species, listed or non-listed, inhabiting the plan area. Secretary may issue permit without public notice for any listed or non-listed species included in plan.	
2. PROCESS						
A. Derivative, time certain process.	HCP is entirely voluntary by FWS. No time limits are required to process.	Same as current prelisting.	Adopt process requirements for 10(a) permits as per section 7, such as the ninety day response time. Findings and deficiencies should be required to be stated. HCP processing must be a discretionary FWS action.	No time limits for Secretarial approval of plan or for issuance of permit.	No time limits for section 10. However, Secretary may consult with the Secretary to determine whether any action by a non-federal party affects listed species. Section 401 provides that within 120 days of submission of proposed CMA, the Secretary is required to make a determination of whether the proposed CMA will promote the conservation of the species to which it applies and is in accordance with other CMA requirements.	A prelisting HCP would not be an incentive to comply but ignored without recourse available to landowner.
B. Duplication.	Requires both state and federal (and local) permits, plans, and contracts.	Same as current prelisting.	Provides for state and federal MOU to delineate responsibilities. One agency, one contract, one permit.	One permit for non-listed species included in an approved conservation plan. Upon issue, permit is subject to further review by the Secretary.	CMA would obviate the need for § 10 permit, any state permit and § 7 consultation, as long as activities comply with terms of CMA.	Streamline the process. Do the best for prelisting species and no more lengthy exerts

**Incentives to Encourage Prelisting Conservation
Comparison of Motivations and Recommendations
June 16, 1993**

Subject	Current Prelisting	Postlisting	Recommended Prelisting	H.R. 2043 (Studds)	H.R. 1490 (Taush)	Comments
2. PROCESS						
<i>(continued)</i>						
C. Minor impact projects	HCP costs are too expensive for projects with minor impacts	Some provisions are made to provide permits efficiently for minimal take	Provide a more efficient process for projects with minimal take, such as 108 and 304 of H.R. 1490.	No provision	Provides that a non-federal person may initiate consultation with the Secretary regarding actions which may affect listed species. Authorizes the Secretary to issue general permits for categories of non-federal activities which have only minimal impacts on listed species	
D. NEPA	Requires at least two public reviews, one on agreement and one when permit is approved. Risk of EIS.	One public review only.	Drop NEPA requirements if prelisting plan is consistent with a conservation plan.	Provides for public review and comment of conservation plan only. Not required when permit is approved	Provides for public review and comment on proposed CMA, requires Secretary to conduct a public hearing in each affected county or parish. Directs Secretary to consider and weigh carefully all public comments	
3. FINANCIAL INCENTIVES						
A. Burden of Costs	Landowner pays.	Broader base of landowner's pay. Limited government funding	Provide grants, loans, or matching funds to support planning. Provide market incentives, prelisting tax credit, and future mitigation credit if species is listed.	Establishes Habitat Conservation Planning Fund to assist in development of HCPs. Authorizes a total of \$20 million for fund over a five-year period	Requires Secretary to the maximum extent feasible to fund 50% of the costs of conditions imposed on incidental take permits (for listed species).	Prelisting is more likely to encourage public funding today. Provide funding for prelisting

Incentives to Encourage Prelisting Conservation
Comparison of Motivations and Recommendations
June 16, 1993

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Subject	Current Prelisting	Postlisting	Recommended Prelisting	H.R. 2043 (Studds)	H.R. 1490 (Tauszin)	Comments
3. FINANCIAL INCENTIVES (continued)						
B. Market incentives	Untested, highly skeptical, not encouraged	Same as current prelisting	Market based incentive should be encouraged and encouraged.	Directs the Secretary to solicit and review one application for an HCP permit for proposed or candidate species, to which market incentives are used as strategy to implement plan.	No provision.	Market based incentive should be allowable and encouraged
C. Public lands	Not a participant. Private landowner may have to pay for public lands	Are a participant.	Fund or otherwise obtain public participation. Treat public lands as though regulated under listing.	No provision	No provision	Currently, burden is placed beyond landowners' holdings for prelisting conservation, disturbance, and prelisting action
D. Economic loss/damage of private property	No claim available	Claim potentially available	Provides funding and/or allow for taking claim to be pursued in event of listing.	No provision	Requires compensation and provides for such compensation where a decision under ESA substantially deprives any person of economically viable use of property.	Currently, a claim is more likely if one waits until after listing. Motivation needs to be reversed.

**Incentives to Encourage Prelisting Conservation
Comparison of Motivations and Recommendations
June 16, 1993**

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Subject	Current Prelisting	Postlisting	Recommended Prelisting	H.R. 2043 (Studds)	H.R. 1490 (Taubin)	Comments
4. PLANNING.						
A (1) Resource data base	Often landowner generated.	Landowner and public agency generated.	Fund resource data base (in areas of high conflict).	Establishes a Habitat Conservation Planning Fund. Secretary may make grants or interest free loans from this fund to assist in development of plan.	Requires the Secretary to collect all species data for listed and non-listed habitat designated. Secretary must identify additional data needs and establish a deadline for collection of such data.	
A (2) Multi-species habitat planning	FWS has little to no money, over budgeted staff, not trained in the benefits of HCP. Often a lack of commitment to planning.	Same as prelisting.	Staff and fund assisted planning efforts. Must include public participation, prelisting, multi-species conservation, with staff time and economic aspects.	Habitat Conservation Planning Fund could be used to develop conservation plans for non-listed species.	Encourage CMAs that conserve non-listed species (i.e. species proposed for listing and candidate species). Authorizes Secretary to provide assistance for the development of multi-species HCPs, for the non-listed species (listed and non-listed) inhabiting the plan area. Section 10 permit would authorize incidental taking of any species included in the HCP.	As more species are listed, staff will be unavailable for prelisting conservation.
B. Preserve/ mitigation banks	Potential preserves are often small and are discouraged as mitigation.		Plan and encourage mitigation banks.	No provision.	No provision.	Prelisting identification of preserves and mitigation banks can obviate the need to list species.

Incentives to Encourage Prelisting Conservation
Comparison of Motivations and Recommendations
June 16, 1993

Subject	Current Prelisting	Postlisting	Recommended Prelisting	H.R. 2043 (Studds)	H.R. 1490 (Taucin)	Comments
5. STAFFING.						
A (1) Quantity.	Insufficient quantity of personnel. Not enough to take a species through an appointment.	Limited quantity.	Provide staff available exclusively for prelisting HCPs (regional, state and federal staff).			
A (2) Training.	Often adversarial staff; integrally involved in multispecies trade-offs and habitat based planning	Same as current prelisting.	Need supportive staff and legal counsel, biological, economic, encouraging, habitat based preservation and trade-offs			Training is also critical to land use planning and conservation planning
6. LISTING.						
A. Level of protection.		Little distinction between endangered and threatened.	Consider threatened status with more flexibility where planning is taking place, need recognition of local efforts	Would extend some level of protection to species proposed for listing and to candidate species.	Clarifies that take prohibitions are automatically applicable to all endangered species, but are to be applied to threatened species only on a case-by-case basis.	H.R. 2043 needs clarification that prohibition against take is to apply to candidate species
B. Notice of a species being listed.	Landowners of approved HCPs are not given actual notice if a species covered by the plan is proposed for listing		Require actual notice to be given and approved HCP in the event of a subsequent listing		No provision requiring action to be taken prior to listing. However, subsequent listing of a species already covered by a CMA or a § 10 HCP does not affect activities taken in compliance with CMA	



August 9, 1993

Congressman Gerry E. Studds
U.S. House of Representatives
Chairman, Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, D.C. 20515-6230

Dear Mr. Chairman:

Thank you for the opportunity to address your Committee on June 16, 1993, and to provide answers to the questions submitted by Congressman Tauzin. I personally commend you and the members of the Committee for holding this hearing and for coming to California for a hearing on July 7. I sincerely hope the Committee recognizes that significant changes to the Endangered Species Act are necessary to improve species conservation and to avoid inequitable economic impacts.

I respectfully submit the following responses:

1. *Based on your experience, how long does it generally take to develop a section 10 HCP? How much does it generally cost? Can you give us an estimate of how much it will cost on an annual basis to implement a HCP?*

Answer: In addition to the examples presented in my testimony on June 16, 1993, a few more examples may help to answer this question. Citation Homes had a \pm 25 acre residential subdivision which was occupied by Stephens' kangaroo rats. The city that the project was located in was not a participant in the broader Riverside County Habitat Conservation Agency (RCHCA) program. The Fish and Wildlife Service agreed to an HCP process in which Citation would pay the same fee as participants in the RCHCA, \$1,950 per acre. It took a year and a half and another \$50,000 (over and above the \pm \$48,000 mitigation fee) to process this HCP. The process cost more than the mitigation. Another example is Home Capital which has spent an estimated two million dollars and has taken six years. Their HCP is at least another year away from completion.

The cost to manage an HCP is something I am less familiar with, and so few HCPs have actually been approved. However, it is estimated that an endowment, or other funding mechanism, will be required for most HCPs of \$1,000 to \$2,000 per acre to cover management costs.

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2. *Are there any special circumstances that applied to the development of some plans that would not necessarily be relevant elsewhere?*

Answer: Each HCP varies according to several factors, including such variables as:

- a) Number of species covered.
- b) Number of landowners participating.
- c) Number of local jurisdictions and public agencies involved.
- d) Extent to which there are overlapping state and local agency endangered species acts or other environmental regulations covering sensitive species that duplicate or compete with the process.
- e) Relative level of conflict between development and species conservation. For example, HCPs within urbanizing areas are more complex than those in rural areas where more flexibility exists to plan preserves and corridors between preserves.
- f) Length of time for which the activities of the HCP will occur. For example, a development project may cover over a 5-10 year time frame.
- g) Cost of the land and availability of public funding.
- h) Degree of "no growth" opposition to the project.
- i) Degree to which the HCP covers unlisted species.

Some of these factors may not be applicable to all HCPs. Ideally HCPs would cover large geographic areas and address all species within that area whether they are listed or not. The interesting point, however, is that such an ideal scenario results in a highly complex and potentially impossible HCP.

3. *According to your testimony, the current law provides too much discretion to the Service over the processing of HCPs and fails to provide time frames for completing such plans. Can you give us an example of when this "flexibility" on the part of the Service has worked against the interests of private landowners?*

Answer: The lack of time limits has caused considerable delay resulting in extensive costs and missed market opportunities. Citation Homes was delayed so that the builder missed the market cycle resulting in economic loss. Processing of the RCHCA HCP and subsequent amendments for the Stephens' kangaroo rat resulted in delay and economic loss to several landowners in Riverside. The Home Capital project could not have occurred over six years. In fact, the entirely discretionary nature of HCPs has worked against every example where I have personally known landowners that have participated in an HCP.

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4. *Mr. Bean has stated his concern about allowing private landowners access to the section 7 consultation process. Do you agree with his assessment?*

Answer: I strongly disagree with Mr. Bean's assessment of private landowners' access to section 7 consultations. I have personal experience with three section 7 consultations. In every case, the conservation agreement (including prevention, avoidance and mitigation of impacts) did not differ from what would have been agreed to under an HCP. The section 7 process was selected because it was more efficient. The critical issue to address in reauthorization of the Endangered Species Act is the absolute inequity of a more efficient process being available to federal agencies, or those few private projects that otherwise require a federal permit, than is available to all private landowners.

The problem I believe Mr. Bean addresses is the creation of isolated, unconnected preserves resulting from project by project mitigation. This problem is not unique to section 7 permits and the solution is not to deny landowners an efficient process. The solution will result from having a broad-based, comprehensive framework within which project by project decisions can be effectively made. Implementation of the National Biological Survey, and encouragement of comprehensive planning, such as Cooperative Management Agreements or California's Natural Community Planning program (NCCP), will create the necessary framework for effective solutions.

While such programs are being developed, the Service simply needs to consider the regional context issues of section 7 applications based upon the best available information. The Service can also establish mitigation banks so as to direct individual project conservation efforts into meaningful preserves.

5. *In your opinion, is the section 10 process a viable option for the "little guy" (i.e. small business and landowners)? What's a reasonable alternative for smaller landowners? How can we make conservation planning affordable, timely, efficient?*

Answer: The current section 10 process is not a viable option for the "little guy." The costs, time requirements, and uncertainties of section 10 HCPs prohibit most landowners from using them. Conservation planning can be made affordable by implementing the recommendations made in my written text. In general, however:

- a) Authorize local jurisdictions to manage conservation and "take" of endangered species under the context of a regional conservation plan.
- b) Provide matching grants for the funding and implementation of HCPs.

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- c) Improve the section 10 programs to provide for timely, efficient processing. Make HCPs a mandatory, non-discretionary action with specific time limits for processing.
- d) Provide a program similar to nationwide permits as authorized under the Clean Water Act.

6. *Having gone through the HCP process, if you had a choice between using a HCP or a Cooperative Management Agreement, which approach would you favor? Why?*

Answer: I view Cooperative Management Agreements (CMAs) as what HCPs were intended to accomplish. CMAs provide distinct advantages over current HCPs. First, they are clearly intended to cover prelisted species. While the legislative intent language of the 1983 amendments provides prelisting authority of HCPs, the Service has not taken advantage of this authority as they could. For example, a CMA would have saved the Carlsbad/Fieldstone HCP considerable time and money. Over one year was spent negotiating the authority of the Service to address only unlisted species in an HCP and to prepare a planning agreement specifying the process under which the HCP would be planned. Second, CMAs provide landowners and local agencies a higher level of certainty that projects and other economic activities will not be stopped once a species is listed. CMAs, as proposed in HR 1490, are also assured of Federal Funding. In summary, CMAs provide several advantages over current use of section 10 HCPs.

7. *While the plan to protect the California Gnatcatcher has been hailed as a shining example of how the Act can work in its current form, many believe that the plan is filled with potential problems. Would you agree with that assessment?*

Answer: California's NCCP approach is an innovative means to solve conflicts between a growing population and species preservation. It proposes a solution for a host of species within a habitat type on a range-wide basis. Secretary Babbitt is to be commended for recognizing the validity of this approach when listing the California gnatcatcher and proposing a section 4(d) special rule to defer to NCCP as the solution. This type of support and cooperative effort are critical to effectively solving conservation issues.

However, many potential problems exist with this effort as with most every program dealing with the Endangered Species Act. Federal funding is being authorized for the planning effort, but it will only be a small component of the total planning costs.

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Funding for acquisition and management of preserves will be dramatically more in comparison, and the source of this funding is uncertain. The California gnatcatcher is one of several sensitive species within the coastal sage scrub (CSS) habitat, and there is no assurance that when the next species is listed that it will also be deferred to the NCCP. No provisions are made yet for essential public utilities which can provide connectivity corridors between NCCP preserves but which cross several planning subregions. Costly debates occur over mitigation for relatively minor impacts of 1 to 20 acres when we are attempting to preserve over 100,000 acres. Questions remain as to what permits will be provided to landowners for all species within CSS habitat and to what extent will NCCP address other sensitive habitats. What happens, when an NCCP is approved and another species is listed in a plan area that was not covered in the NCCP, is unresolved. Finally, we cannot overestimate the complexity of coordinating this program among more than 25 local agencies, tens of thousands of landowners, a California Endangered Species Act, a California Environmental Quality Act, and the National Environmental Protection Act.

Most certainly the program is filled with potential problems. It is, however, an innovative approach that can be supported by the other recommendations I have made in my testimony regarding reauthorization of the Endangered Species Act.

8. *How does the Fish and Wildlife Service currently interpret the definition of "take"? Do you believe that this interpretation is an adequate reading of the Endangered Species Act?*

Answer: I am most familiar with the Carlsbad Field Office's interpretation of "take." Their interpretation of "take" appears to be different from other Field Offices. For example, they have recently asserted that playing a tape recorder to call the gnatcatcher during surveys constitutes a take. They have also asserted that the take of habitat which is not occupied by the gnatcatcher, but which may be potentially occupied by the bird, constitutes take. Other offices and enforcement appear to focus on the species itself, and where even the killing of one individual may not be take as it does not harm the entire species. Such variation is not adequate. The credibility of the law and the wasted resources spent on debating the definition of take do not benefit listed species.

9. *What are some of the measures that you would like to see in ESA reauthorization legislation? Of the bills that have already been introduced, which bill do you believe best improves the process of protecting species?*

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Answer: The measures I have recommended regarding HCPs and to provide incentives for landowners to conserve habitat on a prelisting basis should greatly improve the process of protecting species. A detailed comparison of my recommendations to H.R. 2043 and H.R. 1490 is attached to my written testimony for June 16. Both bills seek to provide clarification of authority for prelisting conservations. Both provide amendments intended to improve the process, provide some funding and encourage proactive conservation by landowners. Dramatic changes to current law are needed, however, to equitably and effectively conserve sensitive species.

The question as to which one bill best improves the process of protecting species leads me to conclude that H.R. 1490 is superior for two reasons. First, it protects landowners going through the process from inequitably carrying the economic burden of species protection. Second, it provides a more comprehensive and efficient process for landowners unable to afford the processing of section 10(a) permits.

Thank you again, Mr. Chairman, for the opportunity to comment on these critical issues. I commit my personal involvement and the continued involvement of the National Association of Home Builders to work with your committee to improve the Endangered Species Act.

Sincerely,

A handwritten signature in dark ink that reads "Edwin G. Sauls" followed by a stylized "PM" in superscript.

Edwin G. Sauls

EGS/pn

MULTI-SPECIES HABITAT CONSERVATION PLAN FOR SOUTHWESTERN RIVERSIDE COUNTY

INTRODUCTION

In October of 1992, the Riverside County Habitat Conservation Agency (RCHCA) and The Metropolitan Water District of Southern California (Metropolitan) established a large, regional multi-species reserve in cooperation with the U.S. Fish and Wildlife Service (Service), the California Department of Fish and Game (Department), and the Riverside County Regional Park and Open Space District (RCRPOSD). The purpose of this Reserve (Figure 1) is to provide for long-term viability of populations of 17 species affected by Metropolitan's Domenigoni Valley Reservoir Project, including the endangered Stephens' kangaroo rat, the threatened California gnatcatcher, and 15 other sensitive species (Federal Candidate species, category C2). This program breaks new ground in many ways.

- First, it establishes a regional multi-species Reserve to be governed by Metropolitan, RCHCA, Service, Department, and RCRPOSD.
- Second, it provides assurances that the construction of the Domenigoni Valley Reservoir Project will not be delayed if one or more of the sensitive species covered are listed. State assurances are provided by a California Fish and Game Code Section 2081/2835 Agreement, which is binding. Federal assurances are provided by a Memorandum of Understanding, but are subject to the "changed circumstances" features of the Federal Endangered Species Act.
- Third, it addresses regional environmental concerns, particularly regarding sensitive species, in a pro-active manner which anticipates the need to set aside habitat for their preservation *before* they become endangered.

BACKGROUND

The Domenigoni Valley Reservoir Final Environmental Impact Report was certified under CEQA in November, 1991. Full mitigation for project impacts to habitat and the listed Stephens' kangaroo rat was accomplished by:

- Acquisition and preservation of the Santa Rosa Plateau, and
- Transfer of an easement for over 1180 acres of Stephens' kangaroo rat habitat to the Riverside County Habitat Conservation Agency.

In a separate action, impacts to the recently listed California gnatcatcher were addressed, prior to listing, in a Section 7 Conference Opinion which recognized the contributions of the Reserve to viability of this threatened species. Fifteen sensitive but unlisted species are within the project impact area; listing of some of these species prior can be anticipated to project completion.

OBJECTIVES OF THIS MULTI-SPECIES PLAN

The MSHCP will contribute to the viability of populations of sensitive species within the region by *at least* offsetting Domenigoni Valley Reservoir Project impacts to the California gnatcatcher and fifteen sensitive species.

The MSHCP will accomplish this by acquiring, preserving, protecting and actively managing a regional multi-species area for the benefit of sensitive species, expanding the existing Shipley Reserve from 3,307 acres to about to 9,000 acres.

The MSHCP will provide a "core" reserve, well sited in the region, which can be expanded by others as funds become available, and to actively promote expansion of this reserve. The RCHCA is currently acquiring lands adjacent to the Reserve, which may therefore be expanded significantly in the near future.

COMPLIANCE WITH FEDERAL AND STATE ENDANGERED SPECIES ACTS

Based on the MSHCP, the State of California has issued a binding Section 2081 Agreement which accepts the plan as full mitigation for project impacts to the species covered. Also based on the MSHCP, the U.S. Fish and Wildlife Service conducted an internal Section 7 Conference, leading to a finding of "no jeopardy" for the California gnatcatcher. In addition a Memorandum of Understanding provides that the Service will consider the MSHCP as the basis for future Section 10(a) incidental take permits if covered species become listed. A change in the Endangered Species Act to permit the plan to be fully binding at the Federal level would provide a more firm commitment from the Federal government.

MSHCP SCOPE

Provides habitat for sensitive species. The Reserve is habitat for the endangered Stephens' kangaroo rat, the threatened California gnatcatcher, and for 13 of the 15 remaining sensitive species covered by the HCP:

- | | |
|--|---------------------------------|
| ● Bell's sage sparrow | ● Ferruginous hawk |
| ● Southern California rufous-crowned sparrow | ● Loggerhead shrike |
| ● San Diego desert woodrat | ● S. D. black-tailed jackrabbit |
| ● Northwestern San Diego pocket mouse | ● Orange-throated whiptail |
| ● Northern red-diamond rattlesnake | ● San Diego horned lizard |
| ● Coastal western whiptail | ● Payson's jewelflower |
| ● Parry's spineflower | |

Provides for enhancement to assist recovery of Coastal sage scrub (CSS) communities previously occupied by the California gnatcatcher;

Includes replanting of two sensitive species within protected areas of the reservoir project property (smooth tarplant, San Jacinto Valley saltbush);

Provides approximately \$10.4 million dollars in funding for Reserve management activities and research.

MANAGEMENT

Overall management-by-consensus by a committee consisting of one voting member from the five agencies which created the Reserve.

Long-term management plans will be developed based on data collected during 5 years of field research;

Short-term funding of \$13,886,000 (including the \$10.4 million in funding mentioned above) provided by Metropolitan during reservoir construction;

Long-term funding of the Reserve will be provided through use of concession funds from Domenigoni Valley Reservoir recreation program.

Long-term management will focus on protection (fencing, fire control, and human access control are primary strategies; limited recreation will be permitted).

BENEFITS OF THE RESERVE

From a conservation perspective, the Reserve provides a high level of protection to many sensitive species in the region. As the Reserve is expanded under other mitigation agreements, its potential to ensure long-term population viability for sensitive species will increase.

From a scientific perspective, the MSHCP and the Reserve offer an opportunity to develop and test models of population viability, which will assist the scientific community in determining the future needs of sensitive species in this region.

From a regional planning perspective, the MSHCP and the Reserve demonstrate what can be accomplished with a cooperative approach to major infrastructure projects and other development. The key features of this approach were:

- **Participation by many regional planning agencies and interest groups in defining regional environmental goals;**
- **Full cooperation of the U.S. Fish and Wildlife Service and California Department of Fish and Game in providing advance assurances that the Reserve would constitute mitigation for the proposed project; and**
- **A proactive approach to project planning on the part of Metropolitan.**

REGIONAL LOCATION MAP



United States House of Representatives
Committee on Merchant Marine and Fisheries
Subcommittee on Environment and Natural Resources

Endangered Species Act Reauthorization

Hearing on Habitat Conservation Plans (HCP's)
Developed Pursuant to the Endangered Species Act

June 16th, 1993: 10:00 a.m.

Room 1334 - Longworth House Office Building

Statement of N. Gregory Taylor, General Counsel
The Metropolitan Water District of Southern California

STATEMENT OF N. GREGORY TAYLOR, GENERAL COUNSEL OF THE
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, BEFORE THE
HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES, SUBCOMMITTEE
ON ENVIRONMENT AND NATURAL RESOURCES, CONCERNING HABITAT
CONSERVATION PLANS (HCP'S) DEVELOPED PURSUANT TO THE ENDANGERED
SPECIES ACT

JUNE 16, 1993

Thank you very much, Mr. Chairman, for the opportunity to
address this most important issue.

Development and use of Habitat Conservation Plans (HCP's)
under the Endangered Species Act are essential for the Act's
successful implementation. They form the basis upon which
incidental take permits under the Act are issued. To keep up
with the increasing number of species being considered for
endangered listing, HCP's must now be developed on a multi-
species basis. Further, development of HCP's should be
encouraged at the pre-listing stage of the administrative
process considering whether to list a species as endangered.
To insure that such proactive action is taken, the Endangered
Species Act must be amended to provide for binding pre-listing
HCP's under which project proponents commit to a significant
HCP effort in return for a commitment to issue take permits
when, and if, a covered species is listed as threatened or
endangered. Amendments to this effect are contained in H.R.
2043 (Sec. 8) and S. 921 (Sec. 9). (Other pending ESA bills
also have pre-listing provisions.) Such pre-listing incidental
take permits are now authorized under the California Endangered
Species Act.

The purpose of my testimony today is to tell you about the experiences of The Metropolitan Water District of Southern California (MWD) and the Riverside County Habitat Conservation Agency in developing HCP plans in western Riverside County. These experiences demonstrate that the HCP process can be successfully used to accomplish the purposes of the Endangered Species Act while at the same time permitting the construction of essential public services and private development.

The Riverside Habitat Conservation Agency (RCHCA) is a joint powers authority composed of the County of Riverside and eight municipalities. Its jurisdiction extends over virtually all of western Riverside County. The RCHCA was formed to develop a Habitat Conservation Plan (HCP) for the Stephens kangaroo rat, an endangered species. [The listing of this species several years ago brought development in western Riverside County to a halt.]

Through the development of an HCP for the preservation of this kangaroo rat, an incidental take permit, under the Endangered Species Act, was obtained by the RCHCA. Any development within the "fee area" was charged a fee of \$1950 an acre. The funds derived from the fee are required to be used to purchase replacement occupied habitat on an acre for acre basis within designated "reserve areas." Over \$20 million

has been raised and development has proceeded within the fee areas.

The Metropolitan Water District of Southern California, which supplies water to more than 16 million people, joined forces with the RCHCA to make this HCP work.

MWD is currently involved in a \$5 billion capital improvement program to insure a reliable water supply.

One of the projects in this program is to build an 800,000 acre foot reservoir in Domenigoni Valley located in western Riverside County. [This will double the existing reservoir capacity of Southern California.] Stephens kangaroo rats (SKR) occupied 263 acres within the project area.

Thanks to the existence of the RCHCA HCP program, Metropolitan was able to obtain incidental take authority for the kangaroo rats within the project area through participation in the RCHCA program. This made it unnecessary for MWD to seek its own Section 10 incidental take permit from the US Fish and Wildlife Service--a savings of substantial time and frustration.

Rather than participate in the RCHCA process by paying fees, MWD purchased 2460 acres of land adjacent to the reservoir site to create the Dr. Roy E. Shipley Reserve, containing about 580 acres of habitat for the SKR. Metropolitan then dedicated an additional 580 acres of occupied habitat on MWD lands to preservation of the species. This

Reserve, purchased at a cost of \$10.4 million, is managed by a five agency management committee which was endowed by MWD and the RCHCA with approximately \$1.5 million. The combined Reserve and other set asides for SKR, 1,180 acres, more than offset MWD's 263 acre impact to the species. After subtraction of the MWD impact acreage, the Reserve left the RCHCA with a positive balance of over 900 acres to use in meeting requirements of its HCP - a win-win situation for both agencies.

MWD completed this transaction with the RCHCA and certified the Environment Impact Statement for the Domenigoni Reservoir Project. MWD then believed that it could start the project without fear of further endangered species problems. Not so!

The California gnatcatcher was then proposed for endangered listing and this was threatened to be accomplished within a year. A number of pairs of gnatcatchers occupied the impact area of the reservoir project. Further checking revealed that 16 other sensitive species occupied the impact area and could be listed as endangered during the 10 year reservoir construction period. MWD could not undertake the project without assurances that the listing of any of these species would not stop the project.

MWD proposed to the RCHCA that an additional 5,700 acre area be set aside for the preservation of the 16 species which

might be listed as endangered during the construction period. This would be accomplished through the creation of a Multi-Species Habitat Conservation Plan for Southwestern Riverside County. The plan would then form the basis for acquiring pre-listing incidental take permits for these species from the California Department of Fish and Game (pursuant to California Fish and Game Code Sections 2081/2835), a Section 7 consultation with US Fish and Wildlife Service (for the California gnatcatcher) and a Memorandum of Understanding with the Service for an expedited issuance of incidental take permits for any of the other species covered by the plan in the event any were subsequently listed.

The pre-listing plan has been completed and approved by all parties. MWD has appropriated \$14 million to fund the program. The California pre-listing incidental take permits have been issued, the incidental take permit pursuant to the Section 7 consultation is about to be issued, and the Memorandum of Understanding has been signed with the US Fish and Wildlife Service.

MWD has begun the construction of the reservoir and has cleared the impact area. Only through the multi-species habitat conservation plans and the pre-listing agreements could this have been accomplished. We do believe, however, that on the federal side of the pre-listing agreement, it would have been much more preferable to have actually received pre-listing

take authority so long as the Habitat Conservation Plan is being followed.

Although there is California authority for the issuance pre-listing incidental take permits, no such statutory authority presently exists federally. This should be corrected during the current re-authorization of the Endangered Species Act. This would not be a radical change to the federal statute because such a procedure was clearly encouraged by Congress during the last consideration of amendments to the act.

At that time, in 1982, Congress addressed the issue of pre-listing planning and the authority of the Secretary of Interior to enter into binding pre-listing agreements. The Conference Report to the 1982 Amendments to the FESA expresses the intent of Congress that such agreements be permitted:

"The Secretary may use [the Section 10(a) permit process] to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to proponents of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act." (Conference Report No.97-835, Endangered Species Act Amendments 1982, Page 30.)

Explicit authority to issue pre-listing incidental take permits was not included in the 1982 amendments to the FESA despite the foregoing language.

Much of the opposition to the Federal Endangered Species Act comes from an inability to deal effectively with a species until after it has been listed. Early development of habitat conservation plans, which could help prevent the need to list in many instances, is not encouraged by the Act as presently written. The kind of proactive stance that MWD and the RCHCA have taken will become much more common if specific authority to develop binding pre-listing HCP's is added to the Act. The benefits will be earlier action to set aside lands for species preservation, a movement towards broader regional multi-species planning, and a more cooperative relationship between Federal regulatory agencies and businesses, municipalities, and other government entities.

Again, it should be noted that in order to address the mounting flood of proposed listings habitat conservation plans should be encouraged to be prepared on a multi-species basis.

Thank you again, Mr. Chairman, for this opportunity to share our experiences with you. It is hoped that they will be of assistance in your legislative review of the Endangered Species Act.



The Metropolitan Water District of Southern California

Office of General Counsel

August 2, 1993

Via Fax and Mail

Hon. Gerry E. Studds, Chairman
U. S. House of Representatives
Committee on Merchant Marine and Fisheries
Subcommittee on Environment and Natural Resources
Room 545, Ford House Office Building
Washington, DC 20515-6230

Attention Leigh Ann Clayton

Dear Congressman Studds:

Questions Submitted for the Record
by Congressman Tauzin

Enclosed are answers to the questions submitted by Congressman Tauzin for inclusion in the record of the Subcommittee hearing on Habitat Conservation Plans which was held on June 16, 1993.

Thank you for the opportunity to respond to the Congressman's inquiries.

Very truly yours,

N. Gregory Taylor
N. Gregory Taylor
General Counsel

NGT:db
Studds

Enclosure

ESA JUNE 16, 1993 HEARING
HABITAT CONSERVATION PLANS
QUESTIONS SUBMITTED FOR THE RECORD
BY CONGRESSMAN TAUZIN

GREGORY TAYLOR - METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

1. (a) Could you please describe the time involved in developing the HCP you described in your testimony?

The Multi-Species HCP for Southwestern Riverside County was first discussed informally in June of 1991, pursued formally in October of 1991, and completed in October of 1992. This was a joint HCP and State of California Natural Community Conservation Plan (NCCP). It required negotiations and approvals of both the United States Fish and Wildlife Service and the California Department of Fish and Game. The length of preparation was influenced by the fact that this was the first large-scale multi-species HCP prepared in southern California. There were time savings in the process also, however, because the basic format of the management agreement had been developed in two previous habitat conservation plans.

It is anticipated that subsequent multi-species HCPs could be done on a faster time track using the form of documents and approaches developed in the completed plan. The time required could be adversely affected by the amount of data collection required by the regulatory agencies for particular species covered by the plan, however.

(b) How much did the HCP cost?

The Budget for the implementation of the HCP is \$13,886,000 in management and research funds. This seemingly large commitment should be viewed in light of the project cost, approximately \$1.8 billion. Including approximately \$200,000 in costs for the HCP development, the HCP represents a small percentage of the total project cost.

2. (a) Do you believe that the current HCP process is a viable option for small landowners and small businesses?

The current HCP process is viable for small landowners and businesses provided it is coordinated by a regional or local agency which establishes a mitigation banking agreement as a part of the HCP. That agency would have to advance the cost of survey, technical report preparation, negotiation and development of the HCP. The cost then would be reimbursed on a prorata basis by the small landowners and businesses who subsequently participate.

(b) What are the alternatives that you believe should be considered?

The first alternative that should be pursued is that described in the answer to question 2(a). The Stephens Kangaroo Rat program of the Riverside County Habitat Conservation Agency is an example of such an approach.

A second alternative for small landowners and businesses would be to acquire appropriate small lands abutting large reserves which are created for major projects such as that described in the answer to question one and incorporating the additional land into the previously created reserve. Since the mitigation plan has already been developed, the small landowners mitigation cost would be kept to an absolute minimum. The Southwestern Riverside County Multi-Species Plan described above specifically permits the inclusion of such parcels of land.

A third alternative would be to permit small landowners and businesses to purchase lands abutting existing public lands, where the species sought to be protected exist, and incorporate that land into the public ownership or deed restrict it to protect the species of concern.

A final alternative would be to allow small landowners and businesses to enhance existing publicly-owned land where the species in question exists to mitigate for the adverse effects of a proposed project elsewhere.

3. Why did you use the Section 7 consultation process for all species except for the kangaroo rat rather than Section 10?

First, the Section 7 consultation process was used for only one of the 16 species covered by the Southwestern Riverside County Habitat Conservation Plan. (The rest were not that far along in the listing process.) It was used for the California gnatcatcher which was a candidate species at the time of HCP was negotiated. A Section 7 consultation is authorized for a candidate species. The provisions of Section 10 are not available for candidate species. Consequently, Section 10 could not be used.

As to the remaining 15 species covered by the plan, only a Memorandum of Understanding with the U.S. Fish and Wildlife Service, promising an expedited processing of an incidental take permit for any of those species in the event of a subsequent endangered listing, was possible. The reason for this is that there is no specific authorization for the issuance of an incidental take permit of a species in advance of its being listed as endangered.

Prelisting agreements authorizing take in advance of such a designation were contemplated by Congress at the time of the 1982 amendments of the Endangered Species Act but not incorporated into

the statute. This glaring omission needs to be corrected in the current reauthorization legislation.

In contrast to the federal situation, California, under its NCCP statute, issued an incidental take permit for all 16 species covered by the Southwestern Riverside County Multi-Species HCP.

The California prelisting procedure permits a project proponent to proactively deal with endangered species problems. A similar provision should be added to the federal statute. This would do much to reduce the acrimony over listing proposals by providing a procedure to anticipate the effects of an endangered designation.

4. (a) Is it true that the habitat was graded once the process was completed and an incidental take statement was issued?

Grading of habitat in the ultimate reservoir impact area was initiated before the HCP process was completed. This was done without an incidental take permit, because none of the species affected were listed at the time.

This activity was required in order to begin legally mandated archeological surveys and intensive geotechnical investigations planned for the spring of 1993.

The timing of grading habitat was dictated by a concern to avoid impacts to the habitat during nesting season for the California gnatcatcher and migratory bird species.

(b) Did grading the habitat give you more certainty than either the Section 7 or section 10 process as to how the habitat could be used?

The grading gave the regional U.S. Fish and Wildlife staff a greater sense of certainty in assessing the effects of the proposed project because it was occurring at the time of their evaluation.

While the removal of habitat may give a degree of certainty in that it no longer exists in a certain location for the present, the duration of construction (6 years), and size of this reservoir project do not permit reliance upon the grading which has occurred without the incidental take provisions of the Endangered Species Act also being available.

It should be noted that the grading which took place was in conformity with the HCP approved by the U.S. Fish and Wildlife Service and the California Department of Fish and Game.

(c) How can we improve the process so that landowners are not encouraged to grade valuable habitat?

It is assumed that this question is directed to the situation where a landowner, owning property occupied by a species which is about to be listed as endangered, goes out and clears that property of habitat so that the species will no longer be present. The purpose of this activity to attempt to insure that the listing will not affect the landowners use of the property in question. (Such activities have often not accomplished the purpose because of the regeneration of the habitat, however.)

The way the process can be improved, so that landowners are not encouraged to grade such habitat, is to provide a means for addressing the problems created by the proposed listing in advance of that action. There is no means in the Act to accomplish that at this time with the requisite certainly for the landowner. The answer is to authorize prelisting HCPs which provide incidental take authorization of the species when subsequently listed so long as the HCP is being implemented.

5. Would you have any concerns with expanding the protection given under the Act to all candidate species?

Yes, providing all the protection of the Act to candidate species would further dilute the efforts of the U.S. Fish and Wildlife Service and increase the shortage of funds to properly administer the Act. It would continue the concentration on a species by species approach which is preventing constructive actions to be taken to preserve habitats and groups of threatened species.

The emphasis of the Act should be on multi-species HCPs which preserve endangered habitats. It is only in this manner that progress can be made in addressing the real objectives of the Act.

Prelisting multi-species HCP agreements which include candidate species should be permitted by the act, however, so that affected parties can deal proactively with problems which are created by their subsequent listing as endangered.

STATEMENT PRESENTED BY WALTER JARCK,
 CORPORATE DIRECTOR - FOREST RESOURCES
 GEORGIA-PACIFIC CORPORATION
 133 Peachtree Street
 ATLANTA, GA 30303
 (202) 521-5103

BEFORE THE ENVIRONMENT AND NATURAL RESOURCES SUBCOMMITTEE,
 MERCHANT MARINE AND FISHERIES COMMITTEE,
 U.S. HOUSE OF REPRESENTATIVES
 WASHINGTON, DC

PUBLIC HEARING, JUNE 16, 1993

Mr. Chairman and members of the Committee, my name is Walter Jarck. I am Corporate Director for Forest Resources for the Georgia-Pacific Corporation. Georgia-Pacific is a major producer of paper and wood products. The company owns and manages 6.2 million acres of forests in North America.

On April 15 of this year, Secretary of the Interior Bruce Babbitt and Georgia-Pacific's President and CEO A.D. (Pete) Correll jointly announced a first-of-its kind, cooperative agreement to balance sound timber management with strong conservation measures to protect an endangered species. The species is the red-cockaded woodpecker, a bird native to the pine forests of the Southern United States.

Under a signed Memorandum of Agreement, G-P will pro-actively manage red-cockaded woodpecker habitat to sustain viable populations where they occur on approximately 4 million acres of the company's commercial forest lands in the South. Currently, 113 colonies of these woodpeckers have been located on G-P land in five states: Arkansas, Louisiana, Mississippi, South Carolina and North Carolina.

The specific plan, which we are making available to the Committee, was developed by Dr. Gene Wood, Clemson University, and John Kleinhofs, regional manager for G-P Forest Resources in Arkansas.

The core of the plan is the maintenance of woodpecker colony areas and associated foraging habitat. It consists of the roosting or nesting cavity trees---which the family group (clan) uses throughout the year, plus a 200 foot buffer zone. Timber harvesting in the colony areas is prohibited, except when required to improve habitat for the birds.

The foraging area lies within a half-mile, 520-acre radius of the colony center. Here, timber management is on a 35 to 40 year harvest rotation. Within each foraging zone, 80 to 120 acres of large diameter trees are provided as suitable habitat.

New roads cannot be built within colony areas and management practices are required to control the forest's mid-story to enhance the desired habitat. The company has agreed to review and evaluate the plan at five-year intervals and make appropriate adjustments.

More than 400 G-P forestry personnel have been trained to recognize the red-cockaded woodpecker and the critical components of its habitat. When new sightings occur the plan automatically goes into effect. While the plan covers 4 million acres of G-P forests in the range of the RCW, currently 56,000 acres are under active habitat management.

Our RCW initiative took more than two years to develop and test. However, this effort was critical to establishing a level of confidence within the company that would allow us to approach the U.S. Fish and Wildlife Service with the claim that G-P could practice red-cockaded woodpecker conservation in concert with commercial forest management. Once we entered into discussions with the Service, their biologists offered a number of constructive suggestions that supplemented the plan and were consistent with our primary objectives.

At that point in time, the only written guidance on "take" was developed for federal forest lands. Initially, Georgia-Pacific requested a letter from the Fish and Wildlife Service acknowledging that the G-P plan would not result in a take of the woodpecker because of habitat modification. While Service officials indicated the plan was proactive and would avoid take, they were not in favor of a "letter-of-concurrence" procedure. As an alternative, they recommended a Habitat Conservation Plan (HCP) and Incidental Take Permit.

Our objective was to demonstrate that private forest management could be compatible with red-cockaded woodpecker protection. G-P came to the conclusion, after serious study, that an HCP fit neither the situation nor the plan we proposed. The HCP seemed to be designed for a situation in which species "take" would occur and a permit would be needed to mitigate destruction of habitat or loss of species population. In contrast, the G-P proposal was a "no take" plan.

The experience of other landowners with HCPs indicated a multi-year and costly process. Further, HCPs can require an environmental assessment or impact study, public hearings, and participation by nongovernment third parties who could raise issues unrelated to the needs of the species or the company. It had the appearance of a land development proceeding with a potential for some public controversy.

Finally, HCPs are location and site specific. Early in our discussions with the Service, we learned that an HCP on the woodpecker would need to be on a forest-by-forest or state-by-state basis. This would have required five HCPs to cover the states where colonies had already been identified on G-P land. It just did not

seem to fit our objective of a positive, voluntary action. Therefore, we made the decision not to pursue an HCP.

It was at this point that the Fish and Wildlife Service suggested a Memorandum of Agreement that would be legally binding on the performance of the company and provide a clear understanding of what forestry activities would avoid "take". This was a new, innovative idea that met the needs of all parties and encouraged a spirit of cooperation. We saw it as biologist-to-biologist planning with a result of good science for wildlife and forestry.

We recognize that Memorandum of Agreements may not apply in every case. Small landowners simply may not have the financial resources to hire a professional wildlife ecologist to develop an MOA, but we do believe they are simpler and less costly than an HCP. In addition, some situations may not lend themselves to a "no take" plan. In such cases, the HCP is the appropriate solution.

The point we wish to make is that the U.S. Fish and Wildlife Service and Secretary Babbitt have now made available to the private sector a new tool that allows reasonable economic use of one's property, yet provides species protection. We are highly pleased with the Secretary's leadership and support of such cooperative agreements. The Endangered Species Act does not provide many incentives for private landowners to engage in cooperative, voluntary efforts. The emphasis is on prohibitions and penalties.

As the Committee reviews the performance of the Endangered Species Act---particularly as it relates to the private sector---we would encourage you to consider the merits of Memorandums of Agreements.

Secretary Babbitt stated: "For years, private landowners have asked for direction on how to avoid "take," ... This agreement provides a breakthrough in establishing cooperative public and private efforts to save an endangered species".

Thank you for the opportunity to testify today. I will be pleased to respond to your questions.

Background on the RCW:

Colonies of the Red Cockaded Woodpecker can be found in Southern woods from East Texas to Southeast Virginia. The 7-inch bird is recognized by a white patch on its cheeks, a red cockade and clawed toes that point in two directions. According to estimates, fewer than 4,000 colonies remain. They nest in clans, which may include three to seven adults, inside live pine trees. Their diet is insects. Nesting season is from early April to June, with usually three to four eggs.

Chronology:

1970: The Red Cockaded Woodpecker is listed as an endangered species under the Endangered Species Conservation Act.

1973: The Endangered Species Act is signed into law.

Mid '70s: Several methods of RCW protection are unsuccessfully tried by forest products companies. These methods focused on protecting cavity trees or colonies without consideration for foraging habitat.

1979: First RCW recovery plan written.

1980s: Major RCW research programs are undertaken, funded primarily by the U.S. Fish & Wildlife Service. This research indicated:

- RCW conservation is dependent on protecting not only the cavity trees; an adequate amount of colony and foraging habitat has to be provided in an appropriate pattern of distribution.
- RCWs primary food source is the larger-size class pine tree.
- Major habitat fragmentation results in demographic isolation.
- The following may result in colony abandonment:
 - Development of dense mid-stories in colony areas.
 - Competition from red-billed and pileated woodpeckers and nest predation by flying squirrels.
- RCW clans that consist of a dominant male, one female and a male "helper" have better reproductive success.

1985: The second RCW recovery plan is finalized, focusing on "minimum viable population size." It sets a recovery goal of 15 populations each with 250 pairs. All recovery populations are on federal lands; 12 are on national forests.

1992: Georgia-Pacific implements its plan to integrate RCW conservation with timber management on Georgia-Pacific forestland in the Southeastern United States.

1993: The U.S. Fish & Wildlife Service and Georgia-Pacific sign a "memorandum of agreement" regarding the G-P plan.

Current activities:

A new RCW recovery plan will probably be published within the next few years. By law, federal agencies will participate in species recovery efforts. Private landowners are not responsible for recovery efforts, but they are responsible to avoid a "take" of a listed species.

Georgia-Pacific's Red-Cockaded Woodpecker Plan

About the Plan:

Georgia-Pacific was the first private landowner to initiate a proactive plan aimed at combining Red-Cockaded Woodpecker protection with industrial forest management. The plan — designed for timber management on G-P forestland in the Southeastern United States — was developed based on available scientific data and G-P's flexibility to adjust standard forest management strategies. It was authored by Gene Wood, Ph.D., forest wildlife ecologist with Clemson University, and John Kleinhofs, a region manager for Georgia-Pacific Forest Resources.

Highlights of the Plan:

The plan includes:

- Locating and marking all active red-cockaded woodpecker colonies on Georgia-Pacific's 4.2 million acres of Southern timberland.
- Maintenance of active colonies, providing adequate foraging habitat for the bird within a half mile of the colony center.
- Maintenance of a 200-foot buffer zone around an active colony.
- Providing at least 80-120 acres of forage habitat for each colony.
- Managing the forage habitat to include 6,000 sq. ft. of basal area of pine trees greater than 10 inches in diameter breast height (2,000 may be 25-29 years old; 4,000 must be at least 30 years old).
- Prohibiting new roads built in colony areas.
- Managing to control mid-story in colony areas.
- Five-year review and revision.

Significance of the Plan:

Georgia-Pacific's plan is significant because:

- It is a voluntary effort contributing to conservation of an endangered species.
- It serves as a model plan for the forest products industry in the South.
- It demonstrates that sound, scientifically valid research and planning can contribute to achieving environmental as well as business goals.
- It provides the Red-Cockaded Woodpecker a home in perpetuity on G-P lands.

Current Status:

The Georgia-Pacific plan is currently in use by all G-P foresters. To foster broad understanding and direct knowledge among company foresters, Dr. Wood has led field-based training workshops at G-P locations throughout the Southeast. To date, more than 400 foresters have been trained. In 1991, the plan was submitted to the U.S. Fish and Wildlife Service as a model for the industry. Agency representatives recognized it as "breaking new ground" and began a cooperative effort to develop a memorandum of agreement, which was signed in April 1993.

RED-COCKADED WOODPECKER MANAGEMENT
MEMORANDUM OF AGREEMENT BETWEEN
GEORGIA-PACIFIC CORPORATION
AND THE UNITED STATES FISH AND WILDLIFE SERVICE

This Memorandum of Agreement is intended to facilitate voluntary cooperation of the United States Fish and Wildlife Service (Service) and Georgia-Pacific Corporation (Georgia-Pacific) to provide for the management and maintenance of the endangered Red-cockaded woodpecker (Picoides borealis).

WHEREAS, the red-cockaded woodpecker is an endangered species as defined by the Endangered Species Act of 1973, as amended (the Act); and

WHEREAS, the Act prohibits Georgia-Pacific from taking an endangered species and take is defined by the Act to include actions which harm or harass an endangered species; and

WHEREAS, the Red-cockaded Woodpecker Recovery Plan approved by the Service on April 11, 1985 established a recovery goal of preservation of viable populations in the major physiographic provinces and forest types where the species currently exists on Federal lands; and

WHEREAS, Georgia-Pacific has created and implemented a formal plan for integrative management of its timberlands entitled "Integration of Timber Management and Red-Cockaded Woodpecker Conservation Goals on Georgia-Pacific Corporation Timberlands in the Southeastern United States" (the Plan), a copy of which is attached hereto as EXHIBIT "A" and made a part hereof as if fully incorporated herein, and

WHEREAS, the Service has developed Guidelines for Preparation of Biological Assessments and Evaluations for the Red-cockaded Woodpecker outlining habitat standards necessary to maximize the likelihood of recovery of the species; and

WHEREAS, the Service has developed a Draft Procedures Manual for the Management of the Red-cockaded Woodpecker on Private Lands that is currently under review by the Service and such review will not be completed prior to finalization of this agreement.

WHEREAS, the purpose of the Draft Manual is to provide guidance and direction, based upon the best available scientific information, for private landowners to avoid a "take" under the Act for habitat modification or behavioral pattern disruptions. The Service presumes that implementation of the timber management and forest cutting criteria in the Draft Manual will provide sufficient habitat to allow for survival of existing red-cockaded woodpecker populations, and has determined that the Plan is equivalent in its conservation effect to the Draft Manual. Assuming that the criteria in the Draft Manual are followed, in pursuing a forestry

or development activity, the Service has indicated that it does not intend to prosecute under the Act in the event a "take" does occur; and

WHEREAS, the Draft Manual has been developed incorporating the best available scientific information across the 13-state range of the red-cockaded woodpecker. Additional information may be developed in the future on the habitat needs of the red-cockaded woodpecker, i.e. what is necessary to avoid "take", on specific populations, or on the specific populations covered by the Plan, which may merit deviation from or amendment to the criteria in the Draft Manual. Based upon current information, the Service finds that the Plan provides sufficient and appropriate cluster and foraging habitat and presumes that implementation of the Plan will not result in a taking of the red-cockaded woodpecker through habitat degradation that disrupts essential behavioral patterns; and

WHEREAS, the objectives of Georgia-Pacific and the Service in entering into this Memorandum of Agreement are (1) to establish an integrated management plan which allows Georgia-Pacific (a private landowner) to realize the economic benefits of its ownership while conserving the endangered species, and (2) to initiate a cooperative research effort to determine new strategies for integrative land management which will conserve non-commodity resources.

NOW THEREFORE, in furtherance of the objectives outlined above, the parties hereto agree as follows:

1. Georgia-Pacific (and its subsidiaries) will carry out forest management practices on timberland owned or leased (10 years or longer) by Georgia-Pacific in the major physiographic provinces and forest types where the red-cockaded woodpecker exists, in accordance with the practices and procedures specified in the Plan with the objective of sustaining indefinitely the active red-cockaded woodpecker colonies present.

2. As part of a cooperative research effort to study the effect of variations in timber age, stocking size, and density within foraging areas, Georgia-Pacific and the Service have agreed that on the tract of timberland described in EXHIBIT "B" (attached hereto and made a part hereof) Georgia-Pacific will attempt to sustain the active red-cockaded woodpecker colonies that exist while reducing the foraging area stocking to 20 square feet of pine basal area per acre (average of 3000 square feet and 150 acres of foraging per active colony).

3. In connection with the cooperative research effort of the parties hereto, the Service agrees to monitor the reproductive success and clan size of red-cockaded woodpecker colonies located on the property described in EXHIBIT "B" for a period of five years and Georgia-Pacific agrees to pay the Service the sum of FIVE

THOUSAND (\$5,000.00) DOLLARS per year for five years to cover the cost of monitoring the colonies. Payment of the \$5,000.00 shall be made on October 1 of each year, and shall be sent to the Assistant Regional Director for Budget and Administration at the Service's Regional office in Atlanta.

4. Georgia-Pacific Corporation authorizes the United States Fish and Wildlife Service, its agents and employees, to enter upon property owned by Georgia-Pacific and described in EXHIBIT B for the purpose of allowing the Fish and Wildlife Service to: (1) capture and band birds in each study colony, (2) monitor the nesting success, and (3) determine clan size.

5. Georgia-Pacific also authorizes the United States Fish and Wildlife Service, its agents and employees, to enter upon all property owned or leased by Georgia-Pacific in the major physiographic provinces and forest types where the red-cockaded woodpecker exists, to confirm compliance with the Plan.

6. In the exercise of the authority granted herein, the U. S. Fish and Wildlife Service will be liable for damage arising from its activities hereunder pursuant to the provisions of the Federal Tort Claims Act. The Service agrees to inform all persons entering on Georgia-Pacific property under the authority granted herein as to the conditions common to this type property which may constitute physical hazards to said employees, agents and contractors and require said employees, agents and contractors to be on the alert for any such hazards both seen and unseen and to take precautions to avoid such hazards while on the property of Georgia-Pacific Corporation. These hazards may include but are not limited to unseen potholes, old wells, dead trees and other conditions common to wild timber land.

7. Nothing in this agreement shall require the Service to expend funds that have not been lawfully appropriated and administratively allocated for such uses.

8. The key officials for this Memorandum of Agreement are Walter Jarck, representing Georgia-Pacific, and James W. Pulliam, Jr., representing the Service. All contacts regarding this Memorandum of Agreement should be made through these key officials at the following addresses:

James W. Pulliam, Jr., Regional Director
U.S. Fish and Wildlife Service
75 Spring Street S.W.
Atlanta, Georgia 30303
(404) 331-3588

Walter Jarck, Director
 Forest Resources
 Georgia-Pacific Corporation
 133 Peachtree Street N.E.
 P.O. Box 105605
 Atlanta, Georgia 30348
 (404) 521-5103

9. This Memorandum of Agreement and the agreements contained herein shall be interim in nature pending publication of the Final Procedures Manual. Changes in the Draft Procedures Manual could necessitate changes in this Memorandum of Agreement. If the final Manual results in a conservation effect greater than the Plan, then Georgia-Pacific shall modify the Plan in accordance with the Final Manual. Upon modifying the Plan, Georgia-Pacific shall submit the Plan to the Service, and the modified Plan shall become effective under this Agreement as if it was the original Plan, if no objection is received thereto within 45 days of submission of the modified Plan. In the event that an objection is made and the Parties cannot agree to the terms of the modified Plan, then any Party may declare this Agreement null and void, effective immediately upon notification to the other Party.

10. This Agreement shall remain in effect for five years, commencing on April 8th, 1993, and extending through April 1, 1998 and shall thereafter self-renew for successive one year periods.

11. Either party may cancel this Memorandum of Agreement upon (90) ninety days written notice to the other party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on 8th day of April, 1993.

GEORGIA-PACIFIC CORPORATION

By: Walter Jarck
 Director, Forest Resources

U. S. FISH AND WILDLIFE SERVICE

By: James W. Pulliam, Jr.
 Regional Director



DEPARTMENT of the INTERIOR

news release

FOR IMMEDIATE RELEASE
April 15, 1993

CONTACT:
Jay Ziegler 202-208-6416
Georgia Parham 202-208-5634

U.S. FISH AND WILDLIFE SERVICE, GEORGIA-PACIFIC LAUNCH LANDMARK ENDANGERED SPECIES AGREEMENT

Interior Secretary Bruce Babbitt today announced a first-of-its-kind agreement which balances sound timber management and strong conservation measures to protect an endangered species.

The agreement with Georgia-Pacific Corp. outlines measures to help assure protection of the endangered red-cockaded woodpecker. At the same time, the accord allows for reasonable harvests of the southeastern pine forests which comprise the bird's habitat.

Under the agreement, Georgia-Pacific will conserve the woodpecker's habitat on approximately 4-million acres of the company's forest land in the southeastern United States while conducting forest management activities, including timber harvesting, to avoid damaging the species. The company will also actively implement conservation measures wherever woodpecker populations are found on company lands.

"In the past, our government has rarely provided guidance to corporations about what they need to do to comply with the Endangered Species Act," said Secretary Babbitt. "They've forced corporations to guess, with the only enforcement tool being the threat of a lawsuit. But with some government leadership, we can move forward to protect species and avoid costly and unpredictable lawsuits. That's the course set by this agreement."

"Georgia-Pacific has committed to very strict protection measures in this accord," Secretary Babbitt said. "But in return, they gain a predictability that is helpful to their business. All of us, in turn, gain greater habitat conservation for the red-cockaded woodpecker."

This agreement to preserve the red-cockaded woodpecker builds upon Secretary Babbitt's efforts to encourage ecosystem planning and conservation techniques in southern California to protect the gnatcatcher.

-- MORE --

"This is another example of how we intend to make the Endangered Species Act work for people and the environment," Secretary Babbitt said. "This accord reflects good resource economics and sound conservation techniques."

The Endangered Species Act prohibits "take" of endangered species, which includes killing, harming, or harassing listed species and, in some cases, destroying their habitat. Under its agreement with the United States Fish and Wildlife Service, Georgia-Pacific has committed to forest practices which will "avoid take" of the species.

"For years, private landowners have asked for direction on how to 'avoid take,' and our government has failed to respond," said Secretary Babbitt. "This agreement provides a breakthrough in establishing cooperative public and private efforts to save an endangered species."

In addition to protecting the more than 100 red-cockaded woodpecker groups (family units) found on its land in Arkansas, Louisiana, South Carolina, and Mississippi, Georgia-Pacific is enhancing woodpecker habitat. Company personnel will locate and mark all active clusters (cavity trees used by groups), maintain and protect buffer zones, prohibit road construction in sensitive areas, and provide adequate foraging habitat for the bird. Georgia-Pacific lands support roughly 20 percent of the known red-cockaded woodpecker groups found on private land.

"Georgia-Pacific is the first major landowner to develop a proactive plan to conserve the red-cockaded woodpecker," said Fish and Wildlife Service biologist Ralph Costa, the recovery coordinator for the red-cockaded woodpecker. "The company's willingness to commit to this program will help speed up recovery of the species."

Georgia-Pacific's president and chief operating officer, A.D. "Pete" Correll, said, "We always are focused on how our forest management activities affect the land and wildlife on it. This agreement confirms that through innovation and leadership, we are balancing the need to provide wood and paper products to consumers with responsible wildlife conservation practices."

The red-cockaded woodpecker ranges from Texas east to Virginia and nests and roosts exclusively in cavities in older, living pine trees. The species declined as its habitat was altered for a variety of uses. The species was listed in 1970 as endangered. The current population is estimated at 10,000 to 14,000 birds in nearly 4,000 groups within 12 southeastern states.



Georgia-Pacific Corporation

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RECEIVED

July 30, 1993

JUL 30 1993

COMMITTEE ON MERCHANT MARINE
 AND FISHERIES

The Honorable Gerry E. Studds
 Chairman
 Committee on Merchant Marine and Fisheries
 U.S. House of Representatives
 Room 1334, Longworth House Office Building
 Washington, DC 20515-6230

Dear Mr. Chairman:

Attached is a response to the questions to me submitted by Congressman Tauzin for inclusion in the record of the Subcommittee on Environment and Natural Resources, hearing on Habitat Conservation Plans, June 16, 1993, Washington, DC.

Thank you for the opportunity to present a statement to the Subcommittee as well as to respond to the questions outlined in your July 9, 1993, letter.

Please have your staff contact me at (404) 521-5103 if further questions of additional information is required.

Sincerely,

Walter Jarck
 Corporate Director,
 Forest Resources

Attachments

RESPONSE TO QUESTIONS SUBMITTED FOR THE RECORD BY REP. TAUZIN,
JUNE 16, 1993, HEARING ON ESA HABITAT CONSERVATION PLANS

Walter Jarck, Georgia-Pacific Corporation, Atlanta. GA

QUESTION # 1 - - -

You briefly explained why Georgia-Pacific did not continue to pursue an HCP. How much time and money did your company spend up to the point that you made the decision? Would the company have prepared the HCP if the Service had refused to sign the Memorandum of Agreement? What are the advantages of taking the approach you took instead of the HCP approach?

RESPONSE:

Up to the time Georgia-Pacific made not to proceed with an HCP the company had invested about \$225,000 staff time, consultants, research testing, and out-of-pocket costs. The preparation of the company's RCW proposal required approximately \$350,000.

Georgia-Pacific reached its decision not to proceed with an HCP. It was a final decision. Had not the Fish and Wildlife Service suggested consideration of the MOA, the company would have implemented its plan on a voluntary basis and continued to collect data to support the premise that the plan would not result in the take of RCW's and that the plan was sound. While it would have afforded the company no legal protection, it would have given us an opportunity to build a data base to prove the scientific integrity of the plan.

The advantages of the MOA saved the company money, time and allowed the plan to be assessed by Fish and Wildlife professionals on the merits. It avoided the necessity of public hearings and the involvement of third parties who could use the HCP process to raise unrelated issues or pursue other agendas. The HCP would have provided no benefits to the company in its efforts to develop a responsible approach to balancing forest management and species protection. The HCP is totally oriented to species protection and provides little recognition of good faith efforts. It is fundamentally an adversarial process designed to mitigate the taking of an endangered species.

-2-

QUESTION # 2 - - -

You have spoken highly of your Memorandum of Agreement as a new tool for private landowners that protects species and allows reasonable economic use of property. Should the Endangered Species Act be amended to ensure that similar opportunities are available to all landowners in the future?

RESPONSE;

The Endangered Species Act should be amended to encourage cooperative agreements on "no take plans" as well as agreements to address potential or candidate species. Access to consultations, such as that granted to federal agencies, should also be promoted. The Act should grant Fish and Wildlife the flexibility to open dialogues with landowners without the fear of prosecution or threat of loss of property utilization. The Secretary has clearly announced his intention to implement the ESA in a spirit of avoiding "train wrecks." His new approach should be incorporated into the Act to codify "flexibility, balance and cooperation."

Until landowners are convinced that the ESA can be administered with a degree of fairness and justice, most of them will not step forward to work with Fish and Wildlife to protect species.

QUESTION # 3 - - -

Do you think the law as currently written gives the Secretary enough protection and discretion to enter into this type of agreement?

RESPONSE:

The ESA clearly gives the Secretary the authority to render decisions on "take" and "jeopardy." Therefore, we believe the Georgia-Pacific agreement is clearly within the scope of the powers granted the Secretary. However, we would suggest that language be included in reauthorization of the ESA to encourage future Secretaries and the Fish and Wildlife Service to become proactive in developing cooperative agreements such as the Georgia-Pacific MOA for red-cockaded woodpeckers. Secretary Babbitt is the first in 20 years of the Act, to step forward with cooperative agreements. Although the Act does not prohibit agreements, it does not encourage them. What attitude will the next Secretary take? No one can answer that questions. The Committee can, however, make a policy decision that cooperative agreements---such as contained in H.R. 1490---is wise policy for the future.

-3-

QUESTION # 4 - - -

You stated in your testimony that small landowners might not have the resources to develop this type of comprehensive agreement, which you have also indicated is less expensive than an HCP. Do you have any suggestions on how the Committee should address the predicament of the small private landowner who does not require a federal permit for incidental take?

RESPONSE:

The Fish and Wildlife Service could develop model or standard agreements for landowners with small acreage activities where "no take" would occur. The Service could also use the Consultation Process as a means to advise the landowner how to mitigate his land activities or to avoid take.

The basic problem for landowners is understanding how the Service will apply "take" in habitat modification. General guidance for a species is necessary. Once the Service issued guidance, the landowner could seek consultation with the Service to reach a written agreement for his specific situation. Until the Service can give guidance to individual landowners on mitigation or avoidance of "take," the landowner is always left in a uncertain situation as to his responsibility and liability.

Large landowners or corporations can afford to take the initiative in a MOA or HCP. It is not reasonable to expect small operators to undertake such an initiative. The Service either has to clearly outline what landowners must do to avoid take of a particular species or it must engage directly in helping the landowner through the process. This may will require the Service to cost-share or underwrite MOA's and HCP's. The concept of government agencies helping citizens through education and technical assistance is well founded. Unfortunately, the Service is not prepared to offer this assistance. Perhaps a combined federal-state role with state wildlife agencies assuming the implementing responsibilities is feasible. County or regional government plans are also a possibility.

In agriculture, the county agent helps; in forestry, service foresters. Again, the solution lies in a consultation process for private landowners and the states. Until there is an opportunity and incentive to open a dialogue between landowners and Service personnel, the system will remain private sector unfriendly.

QUESTION # 5 - - -

How is the Fish and Wildlife Service currently interpreting "take" of a species under the Endangered Species Act? Do you believe this is the correct interpretation?

-4-

RESPONSE:

Identifying a Fish and Wildlife Service "interpretation" of take is difficult. The agency rarely issues anything but "guidelines" for a particular species which, of course, are not binding. This imprecision is all the more troubling given the broad range of activities of the species which, if impacted, could result in a charge of take: "breeding, feeding and sheltering". The regulations do call for "actual death or injury." However, the agency has never established a consistent interpretation which requires its personnel to have physical evidence before alleging or even suggesting that a take has or might occur. This allows field officials to advise landowners that a take will occur if they proceed with some land use activity, even if the activity will only affect habitat, without any fear of accountability.

QUESTION # 6 - - -

What are some of the measures that you would like to see in ESA reauthorization legislation?

RESPONSE:

The access to private sector consultation identical to federal agencies is the most logical start. H.R. 1490 provides this remedy at no cost to species protection.

Cooperation and agreements should be initiated by the Fish & Wildlife Service. They must become proactive in assisting private landowners through the problem of balancing economic activity with species protection. The Service must, therefore, abandon its traditional passive, neutral role of approval authority and work with private and state interests through more guidance. Again, H.R. 1490 includes language to encourage cooperative agreements.

Threatened species, as opposed to endangered species, may not require protection from every incidental take since they are at less risk. ESA Section 9(a)(1) applies the full take prohibition to endangered species only, and ESA Section 4(d) permits the Fish and Wildlife Service to apply the take prohibition selectively---in whole or in part---to threatened species where "necessary and advisable." The Congress could direct the Service to reconsider its rule (50 C.F.R. Section 1731(a)) which applies the full take prohibition in a blanket fashion to all threatened species. This would return the Service to use of the language in the Act as originally adopted by the Congress. Reconsideration of the blanket rule could give the Service some flexibility to assist small private landowners in avoiding the full burden of applying for HCPS.

Compensation to individual (non-corporate) landowners in cases of last resort when there are no alternatives under cooperative agreements or habitat conservation plans must be considered. When an endangered species makes one's property economically useless, then compensation, acquisition or land trades should be considered. H.R. 1490 recognizes this problem and offers a solution in limited situations.

INTEGRATION OF TIMBER MANAGEMENT AND
RED-COCKADED WOODPECKER CONSERVATION GOALS
ON GEORGIA-PACIFIC CORPORATION TIMBERLANDS
IN THE SOUTHERN UNITED STATES

Prepared by

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Consultant Forest Wildlife Ecologist

and

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Western Region Manager - Forestry

Georgia-Pacific Corporation

Revised and implemented

January 1, 1992

Final revision

October 9, 1992

STATEMENT OF PURPOSE AND INTENT

Georgia-Pacific Corporation recognizes its legal responsibilities to constraints set forth by the Endangered Species Act of 1973 and ensuing amendments. However, as with other businesses, the health and vigor of Georgia-Pacific are determined by profit motives and margins. To a large extent these entities are aimed at and dependent upon the harvest of land resources.

Meaningful conservation practices are not cheap. If they were, then the idea of conservation would be trivial, which it is not. The challenges to our intellect, energy, science and technology are first to recognize that natural resource management goals must not be mutually exclusive, and, second, to devise and implement strategies for integrative management which will result in both the realization of economic gains and the conservation of non-commodity resources.

The purpose of this management plan is to outline a strategy with which Georgia-Pacific Corporation can comply with the Endangered Species Act as it regards the red-cockaded woodpecker (Picoides borealis) while continuing to practice forestry on its timberlands in the southern United States. With implementation of this strategy the Corporation intends to demonstrate that the integration of timber management and red-cockaded woodpecker management practices can be both ecologically and economically sound.

PROBLEM STATEMENT

The red-cockaded woodpecker (RCW) has become an endangered species as a result of the loss of special habitats which it requires for survival. Over most, although not all, of its range the RCW appears to require pine trees for cavity excavation which are more than 70 years old and which normally have some form of heart rot. These trees can exist in even-aged, two-aged, or uneven-aged stands. However, typically these stands have an open structure. As stands become more structurally complex, and especially as hardwood abundance increases, their ability to accommodate the RCW on a sustained basis correspondingly declines. Wide-scale shortened rotations and increases in amounts of hardwood invasion in older pine stands have resulted in both the loss of active RCW colonies and greatly diminished opportunities for new colony establishment.

Short rotation management, particularly rotations of less than 40 years, have caused substantial declines in amounts of foraging habitat. The RCW appears to feed primarily on the boles of trees which are greater than 10 inches dbh. It tends to avoid young densely stocked stands. Management strategies that involve no thinnings before the age of 25 years normally are not capable of providing adequate amounts of foraging habitat. (Note: Georgia-Pacific Corporation operates its southern pine timberlands on a sawlog rotation that involves first thinnings in stands 15 to 18 years old.)

The U.S. Fish and Wildlife Service has developed Guidelines for Preparation of Biological Assessments and Evaluations for the Red-Cockaded Woodpecker which state habitat provisions necessary to maximizing the likelihood of sustaining the species. The Service has assumed the position that colony abandonment following failure to adhere to these guidelines may constitute strong evidence of a legal "take."

The problem is constituted by recognition that RCW habitat cannot be maximized on industrial forests where profit margin must continue as the primary management goal. The challenge then becomes one of optimizing strategies. The bottomline is that a

portion of profit margin will have to be sacrificed in order to provide RCW habitat adequate to insure a high probability of sustaining current population levels on any given industrial forest.

MANAGEMENT PLAN SUMMARY

This plan describes how Georgia-Pacific Corporation will carry out its forest management practices with the objective of sustaining indefinitely the current number of active RCW colonies that exist in viable populations on its southern timberlands. Upon discovery of a colony, all active cavity trees in the colony will be examined for activity status. If at least one cavity tree is being used for roosting by an RCW then the colony will be designated as active. The cluster of active cavity trees will be placed immediately under protection by establishing a 3-chain buffer zone around the cluster. The enclosed area will be known as the colony area. No regeneration cutting will be allowed within the colony area boundary. Thinnings of pine and removals of hardwood will be allowed and may be encouraged as appropriate to the conservation of the colony area. Establishment and use of woods roads (unimproved) and skidding roads through colony areas will be discouraged and restricted to that which is absolutely necessary. Skidding through colony areas will be prohibited during the period April 1 - June 30. No skidding roads or haul roads will be developed within 1 chain of an active cavity tree at any time. Establishment of improved roads through a colony area will be prohibited, but if the RCW establishes a colony along or near a pre-existing improved road no provision will be made to change the traffic patterns during any season of the year.

Colony areas which upon discovery have been abandoned may be treated in one of two ways. If the colony area is in reasonably good habitat condition or it can be managed to achieve such a condition and it is within 1/2 mile of an active colony where the habitat is rapidly deteriorating (e.g., residual seedtrees on a regeneration area), then it may be appropriate to manage the abandoned colony as a replacement colony. The second alternative will be to treat the abandoned colony as any other stand of comparable age and condition on the forest. Under the second alternative, treatment will be commensurate with timber management goals.

Active colonies that are not demographically isolated and that are abandoned subsequent to discovery will be protected and maintained for 5 consecutive years following documentation of abandonment. If the colony is not reoccupied within the 5-year period, management of the area will revert to the timber management plan appropriate to its age and condition. Demographically isolated colonies will revert to normal timber management strategies immediately following documentation of abandonment.

Upon discovery of an active colony, all regeneration cutting, current or planned, within 1/2-mile of the geometric center of that colony area will be halted until reconnaissance surveys can demonstrate that at least 6000 ft.² BA in trees 10 inches and greater dbh will be reserved to serve as foraging substrate. At least 4000 ft.² BA will be in stands at least 30 years old. The additional 2000 ft.² BA may be in stands 25-30 years old but the stocking rates will be 50-100 ft.²/acre. Stocking rates of 60 ft.²/acre will be recommended for all foraging habitat.

At no time will a colony area be completely surrounded by stands less than 25 years old. At least 10 acres in stands 25 years old or older will be adjacent to the colony area at all times. Other foraging stands may be separated by distances not to exceed 10 chains. There will be no seasonal restrictions on logging in foraging areas.

The discovery and documentation of new colonies and of colony abandonment will be a continuing process. Field workers making timber reconnaissance surveys or marking timber for cutting will make most of these discoveries. Documentation of activity status will be by specially trained personnel.

This management plan will be reviewed and appropriately revised every 5 years. Revisions will be commensurate with new research findings concerning RCW conservation practices and experience with practicability of the strategies proposed here.

MANAGEMENT PLAN

I. Colony Areas

A. Definition

An active colony area will be defined as the cluster of active and recently abandoned but unaltered cavity trees. An active cavity tree will be one which shows current or recent maintenance activity as evidenced by fresh (current year) pitch-flow and a smooth reddish bark resulting from recent scaling activity. Abandoned but unaltered cavity trees will be those which may not show current or recent pitch-flow but neither will they have a cavity entrance altered by pileated woodpeckers or other competing species. Also the cavities in these trees will not have evidence of use by flying squirrels, or contain the nest materials of competing species, or contain water. A single active cavity tree can constitute an active colony. A colony area may be more than but not less than 10 ac in size. The area boundary will not be closer than 3 chains to active and abandoned but unaltered cavity trees. The colony area will have an overstory stocking of 50-60 sq ft BA/ac of pine stems if the timber is available at the time of colony discovery, otherwise, it will be managed towards that stocking goal.

Unless information exists to the contrary, cavity trees within 20 chains of each other will be considered to belong to the same colony. A cavity tree located at 10-20 chains from the nearest active cavity tree in a definable cluster will be connected to the main cluster by a 3-chain corridor with 50-60 sq ft BA/ac in pine stems and it will be protected by being located at the center of a square buffer area measuring 6 chains on each side.

An abandoned or inactive colony area will be one which does not contain any active cavity trees.

B. Discovery and Documentation

Discoveries of RCW colonies may be of two types. Accidental discoveries may be made by Georgia-Pacific personnel or forest-users such as loggers, hunters, birdwatchers, etc. It is expected that most discoveries will be made by personnel during routine timber reconnaissance surveys or timber marking (spotting) for thinning, regeneration, or seedtree removal operations.

Once a discovery is reported it will be documented by trained Georgia-Pacific personnel. If the discovery is validated, the appropriate district forester will be immediately informed and he will begin a prudent course of action with respect to the colony and on all lands within 1/2 mile (or nearest 13 forties) of the geometric center of the colony area.

C. Colony Status Designation and Appropriate Procedure

If one or more active cavity trees are found in the new colony then the colony will be designated as active. If the colony is determined to be abandoned but its location is within 1/2 mile of a colony that is rapidly deteriorating (e.g., seedtrees in an aging regeneration area) then it may be appropriate to reserve the area to provide replacement colony habitat. Colony areas discovered to be abandoned and not needed or not appropriate for replacement colony area management will come under two additional categories. The first will be composed of abandoned colonies which had been previously documented to be active. The second will be composed of abandoned colonies which previously were not known to exist.

1. Active Colonies

Upon discovery of an active colony area all cutting within 1/2 mile (or nearest 13 forties) of the geometric center of the area will be halted

until the colony area (see definition page 6) and its associated cavity trees can be marked for protection. Furthermore, it must be determined that removal of the timber subject to the current on-going operations will not: a) reduce colony area size to less than 10 ac, b) isolate the colony from foraging habitat, c) leave less than 10 acres of foraging habitat adjacent to the colony, d) reduce total foraging substrate below 6000 ft.² pine BA of which at least 2/3 will be in stems at least 10 inches dbh in stands at least 30 years old and stocked at 50-100 ft.²/ac (60 ft.²/ac recommended), and e) separate foraging habitat stands by more than 10 chains. If these conditions are met, then previously existing operations or planned operations will continue. If they are not met, then operations and plans will be adjusted to meet them.

2. Abandoned Colonies for Replacement Colonies

If a determination is made that a newly discovered abandoned colony could serve as a replacement colony area for a colony that is rapidly deteriorating, then the same procedures outlined for active colonies will be applicable. The replacement colony area will not be less than 10 ac in size and it will contain the overstory stocking most suitable for colony area habitat in one contiguous block.

3. Abandoned Colonies Previously Documented as Active

The date of discovery of abandoned status will be recorded. Management of the colony area and associated foraging area will continue as if the colony was active for 5 consecutive years. Colony status may be checked periodically or at the end of the 5-year period. If the colony does not become active within the 5-year period, the

colony and associated foraging area will revert to a timber management strategy appropriate to area conditions.

4. Abandoned Colonies Not Known Previously to Exist

Timber management will continue according to standards normal for the rest of the forest.

5. Demographically Isolated Colonies

Demographic isolation describes a situation in which a RCW clan is highly unlikely to exchange genetic material with a definable RCW population. Genetic material exchange results from successful juvenile dispersal (i.e., dispersers become breeders in other colonies) and mate recruitment. No definitive guidelines exist that clearly define a RCW population or that define precisely what constitutes demographic isolation. Therefore, for purposes of G-P management planning, a conservative standard will be used in conjunction with the USFWS guideline for spatial separation sufficient to constitute biological separation of two populations.

Demographic isolation will be constituted when a RCW colony is located more than three miles from the next nearest active colony with a breeding pair and the intervening space is fragmented by four or more breaks in foraging habitat that are each more than 10 chains wide. If the foraging habitat is continuous, i.e. less than four breaks each equal to or less than 10 chains wide, then the spatial separation will be five miles before demographic isolation will be constituted.

D. Cavity Trees: Marking, Measuring, Describing

1. Marking

All cavity trees in all newly discovered colonies will be marked by painting two 4-inch wide bands on the bole at eye-level. Marking will follow the code:

- a. two red bands--an active tree as indicated by fresh (current year) pitch-flow, recently excavated pitch wells, fresh plate maintenance activity, and recently scaled bark which has resulted in a reddish color of the bole;
- b. one red band over one yellow band--a recently abandoned cavity tree as evidenced by either absence of fresh pitch-flow, or if fresh pitch-flow exists then the cavity entrance or cavity has been altered by competing species, or competing species are known to be using the cavity;
- c. two yellow bands--a tree abandoned for more than 1 year as evidenced by lack of fresh pitch-flow or maintenance activity and pitch condition and color may range from off-white to dark yellow. Also a cavity-start (or start) tree in which the wood around the entrance has turned to a dark, mildew color from lack of recent work may be marked with this code;
- d. one red band over one red band with yellow stripes--a cavity-start (or start) tree. Excavation of the cavity entrance has at least begun or may be well advanced but the cavity has not been completed. Color of the wall of the entrance is yellow.

Every cavity tree will be numbered for identification. The number will be painted on the tree with yellow paint. The numbers will be at least 8 inches tall.

2. Remarking

As colonies are re-examined periodically new start and cavity trees occasionally will be found. Also the status of previously marked trees may change. New discoveries in a colony will be appropriately marked and old trees whose status has changed will be appropriately remarked. Colony area boundaries will be adjusted as is appropriate to colony area definition (see page 6).

3. Measuring

Table 1 lists 22 variables which might be measured and recorded for each cavity tree. The essential variables which will be recorded for every cavity tree will be: 1-6, 8, and 14-16. All other data will be optional (at the discretion of the district forester) or will be taken as part of special long-term studies or during monitoring for clan reproductive success. Each line of data on a cavity tree will be date specific. As new observations accumulate they will be entered into the data set on consecutive lines.

Codes for variables requiring coding will be as shown in Table 1A.

TABLE 1. Variables and data formats for cavity tree information

Variable Number	Columns	Format
		<u>Variable or Description</u>
1	1	Colony status
2	3-5	Colony number
3	7-8	Tree species
4	10-11	Tree number
5	13-14	Cavity tree status
6	16-18	Cavity tree age
7	20-22	Number growth rings to heart rot
8	24-27	Diameter at breast height (inches)
9	29-31	Total height (feet)
10	33-34	Height to first limb (feet)
11	36	Crown class
12	38	Crown protection
13	40-43	Radial growth for last decade (inches)
14	45	Number active cavities
15	47	Number inactive cavities
16	49	Number starts
17	51	Cavity number (identification)
18	53	Cavity status
19	55-56	Cavity height
20	58	Heart rot at cavity (yes/no)
21	60-63	Depth to heart rot at cavity (inches)
22	65-68	Date of examination

(Note: For trees with multiple cavities continue in same columns on successive lines.)

TABLE 1A. Definition of coded variables in Table 1.

<u>Variable Name</u>	<u>Code</u>	<u>Definition</u>
Colony Status	A	Active
	I	Inactive
Cavity tree status	AC	At least one activity cavity
	IC	No active cavities
	AS	Active start
	IS	Inactive start
Crown class	1	Dominant
	2	Codominant
	3	Intermediate
Crown protection	1	Well protected; close neighbor crowns on four sides
	2	Fair protection; close neighbor crowns on 2-3 sides
	3	Poor protection; close neighbor crowns on 1-2 sides
	4	No close neighbor crowns
Individual cavity	1	Active
	2	Recently abandoned
	3	Long abandoned
	4	Entrance enlarged
	5	Active start
	6	Abandoned start
	7	Advanced start
	8	Long abandoned and enlarged
Tree species	9	Recently abandoned and enlarged
	LO	Loblolly
	SC	Short coat
	SS	Slash
	LL	Longleaf

E. Colony Areas: Establishing, Marking, Measuring, Description

1. Establishing and Marking

The colony area boundary will be set to encircle the cluster of active, active start, and abandoned but unaltered cavity trees. (An abandoned but unaltered cavity tree is one which is abandoned but has no evidence of alteration of the cavity or cavity entrance by competing species and no competing species are known to be present). Other abandoned cavity trees will not affect the setting of the boundary line. The boundary line will be set such that it does not come closer than 3 chains to a protected cavity, recently abandoned but unaltered cavity, or start tree. The zone between the boundary line and the nearest cavity tree will be the buffer zone. The boundary will encompass at least 10 ac of colony habitat (see definition page 6).

If a cavity tree is located more than 20 chains from the nearest cavity tree belonging to a cluster, unless there is information to the contrary, that cavity tree will be assumed to either belong to another colony area or to be a single-tree colony. A single-tree colony would be allotted a minimum area of 10 ac of colony habitat and it will be protected by boundaries appropriate to it. If a cavity tree is more than 10 chains but less than 20 chains from the nearest cavity tree in a cavity tree cluster, it will be connected to the main cluster by a 3-chain wide corridor and protected by being placed at the center of a square buffer-area measuring 6 chains on each side.

Colonies are dynamic therefore their boundary lines will be dynamic. New cavity trees will be created and previously active trees will become abandoned. Upon periodic re-examinations, the

boundaries should be adjusted appropriate to the new distribution of active cavity and start trees to be protected. No colony will be allowed to shrink below 10 ac. Colony areas may increase in size as necessary.

The colony area boundary will be marked with plastic flagging tape. The line will be periodically rechecked to determine that the tape is in place. The boundary will be remarked if a fire passes through the area and destroys the flagging.

2. Measuring

The colony area boundary traverse will be mapped using a hand compass and tape. The traverse will be plotted and the area acreage will be measured. District foresters will be encouraged to cruise colony areas and develop a continuing data base on habitat conditions. It will be recommended that basal area in pine be tabulated by 2-inch dbh class and totaled for trees 5-9 inches dbh separately from trees more than 9 inches dbh, and that estimates of pulpwood and sawtimber volumes be made.

3. Description

In addition to the quantitative variables listed in Table 2 the field examiner will also note the qualitative condition of the colony area. Notes should indicate hardwood stocking problems, development of pine-hardwood midstory, and presence of hardwood trees or midstory development within 50 feet of protected cavity trees (active, active starts, abandoned but unaltered).

TABLE 2. Variables and data format to be used to describe colony areas.

<u>Variable Number</u>	<u>Format Columns</u>	<u>Variable Names or Descriptions</u>
1	1-3	Colony number
2	5-14	Legal description of "forty"
3	16-20	Colony area acreage
4	22-26	Total basal area (ft. ²) in pine pulpwood (6:- 8" dbh classes)
5	28-32	Total basal area in pine sawtimber (10" dbh class and larger)
6	34-38	Total basal area (ft. ²) in merchantable pine stems (var. 4 + var. 5)
7	40-45	Total pine sawtimber volume (mbf)

4. Documentation of Demographic Isolation

Documentation of isolation will be made based on the cumulative evidence from three data sources. The total amount of information from all three sources will be offered to the USFWS as evidence for documentation. These sources will be:

- a. nearest USFWS field office;
- b. appropriate state wildlife agency (either Natural Heritage Program or Non-Game/Endangered Species Division as is appropriate); and
- c. information gathered by G-P personnel.

5. Tracking Isolated Colonies

Once a colony is either known to be or is suspected of being demographically isolated, G-P personnel should visit the site at daybreak at least once every one to three months. Each visit should be documented by a note to the files that records date and time of visit and the number of RCWs seen. If the observers do not detect the presence of at least one RCW on the first visit of a check period, then they should revisit the site for the next four consecutive days or until an RCW is seen whichever comes first.

6. Declaring Colony Abandonment

When no RCWs are detected during site visits on five consecutive days, the area forester may declare the colony to be abandoned.

F. Colony Area Protection

1. Roads and Skidding Roads

No new improved roads will be developed through a colony area. If a colony becomes established such that it encompasses a portion of a pre-existing improved road no attempts will be made to alter normal traffic patterns on that road at any time of the year.

The development of woods roads through colony areas will be restricted to those which are absolutely essential to a given forest operation. A woods road which passes within 3 chains of a known nest tree when eggs or nestlings are present will be re-routed or closed until the nestlings are fledged. Woods roads that are to be developed and which have no practicable alternative except to pass through a colony area will not pass closer than 1 chain to an active cavity, active start, or abandoned but unaltered cavity tree.

Log skidding through a colony will be discouraged at all times but will be prohibited from April 1 through June 30. Skidding logs within 1 chain of an active cavity, active start, or abandoned but unaltered cavity tree will be prohibited, except in cases when such skidding is necessary to the removal of trees that degrade the integrity of a cavity tree, e.g., hardwoods and beetle infested pines. No log loading decks will be allowed within a colony area at any time.

2. Fire

Practices normal to the forest for fire prevention and suppression will be continued in and around colony areas. Prescribed burning for hazardous fuel reduction will be continued commensurate with other forest operations.

3. Southern Pine Beetle Control

Southern pine beetle (SPB) outbreak in stands typically stocked at 60 ft.² BA/ac of susceptible species would be unusual, but possible. Trees other than active cavity trees, discovered to be infested with SPB will be felled immediately regardless of season or nearness of the infested tree to any active cavity tree. If an active cavity tree becomes infested it will be left standing but all other trees, except other active cavity trees, within a 30 ft. radius will be felled. Salvage of SPB infested trees will be at the discretion of the district forester who will be expected to proceed prudently during the nesting season. Prudence will be the quality of judgement in balancing gains from salvage against the potential for disruption of RCW reproduction or damage to remaining active cavity and active start trees. The USFWS will be informed of these situations and the intended management procedures before any company actions are taken.

G. Colony Area Management

1. Goals

- a. Perpetuate colonies already existing in good habitat for as long as possible.
- b. Provide replacement colony habitat where currently existing colony habitat is rapidly deteriorating.

- c. Maintain healthy stand conditions to minimize the potential of habitat losses to fire, insects, and disease.

2. Managing Stand Composition

Pine sawtimber will be maintained at 50-100 ft.² BA/ac (60 ft.²/ac recommended) for the life of the active colony plus 5 years.

Pine basal area management will be accomplished with thinnings scheduled outside of the period of April 1 to June 30. Thinning operations will involve all practicable precautions to avoid injury to stems or root systems of active cavity, active start, and abandoned but unaltered cavity trees.

The aim of hardwood management will be to reduce and maintain hardwood stocking to the lowest practicable level. All commercial hardwoods will be harvested as is practicable. Prescribed burning will be conducted as is practicable to control hardwood encroachment and development. Where it is practicable and commensurate with other forest operations and with USFWS approval, colony areas may be treated with herbicides for hardwood control.

3. Cavity Tree Crown Protection

Because cavity trees are liable to stem breakage during severe wind storms, thinning activities will be conducted so that crowns of active cavity, active start, and abandoned but unaltered cavity trees remain protected by crowns of neighboring trees.

4. Stand Structure

The primary objective will be to keep the colony area free of midstory development. This will be accomplished by whatever methods are

practicable in each specific situation. Ideally, open, park-like conditions should prevail in the colony area. Establishing and maintaining this condition will be an objective sought within the constraints of soil-site conditions.

5. Salvage Operations

No salvage operations, except for those directly connected to SPB control, will be allowed during the period April 1 to June 30 in the colony area. No trees in a colony area will be subject to salvage unless specifically marked for salvage and in the judgement of the district forester the salvage operation can be accomplished without damage to active cavity, active start, or recently abandoned but unaltered cavity trees. Salvage operators will be informed by the district forester that these cavity trees are to remain totally protected during felling, skidding, and hauling operations.

6. Prescribed Burning

Prescribed burning for hazard reduction will be carried out commensurate with the burning policies of the particular forest. Burning will be scheduled outside of the period of April 1 to June 30, but growing season burning for hardwood control will be encouraged where it is practicable and commensurate with other forest operations. The method of prescribed burning will not be restricted except to disallow nighttime burning and otherwise normal prudence. In cases where pitch-flow on active, active start, or abandoned but unaltered cavity trees descends down the bole to within 15 ft. of the ground, or where fuel accumulation is very heavy

at the base of one of these trees, the fuel will be raked away from the trees and scattered.

7. Herbicide Treatments

On occasion it may be desirable to treat colony areas with a herbicide for hardwood control. Use of herbicides will be according to silvicultural desirability and economic affordability and per USFWS approval of the chemical to be used and method of application.

8. Managing Abandoned Colony Areas

If an active colony area under management becomes abandoned, routine management and protection will continue for 5 consecutive years or until the colony is reoccupied, whichever comes first. So long as the colony is unoccupied the constraints on management activities during the period April 1 to June 30 will not apply. If the colony is not reoccupied within 5 years and it is not needed as replacement colony habitat, management will revert to timber production goals.

9. Suppressing Colony Abandonment Rates

Among the factors which may cause colony abandonment, competition from pileated woodpeckers and flying squirrels can be very important. No acceptable technology has been developed to control flying squirrel problems, but destruction of cavities by pileated woodpeckers might be suppressed with the use of pileated excluders. These sheet metal devices may be used to protect active cavities or to renovate abandoned cavity trees. The advantage to this procedure is to maintain a colony in one location for as long as possible and suppress the likelihood that a clan will abandon and

establish a new colony in poorer habitat (e.g., seedtrees in a regeneration area) or at a location more difficult to manage or even adverse to timber management goals. Therefore, pileated excluders may be employed where the procedure is deemed appropriate.

10. Replacement Colony Habitat Management

Replacement colony habitat will be of two types. The first type will be abandoned colonies that are located within 1/2 mile of an active colony which is deteriorating rapidly in habitat quality (e.g., colonies in residual seedtrees in regeneration areas.) The abandoned colony area may serve as replacement colony habitat if its continued maintenance is a silviculturally viable proposition and continued management is more desirable than creating a new area with stand conditions that would accommodate new colony development within 1/2 mile of the still active colony. Where an abandoned colony is being managed as replacement habitat, pileated excluders may be placed on abandoned cavity trees.

The second type of replacement colony management will begin with the prediction of how much longer the currently inhabited stand will live. Management will be such that the replacement area will come into a condition suitable for RCW invasion as the old area deteriorates through natural mortality. The replacement area will be at least 10 acres in size and it will be located adjacent to the active colony. The replacement area will be managed with normal thinning practices. Hardwood encroachment and development will be suppressed using appropriate cutting, burning, and the application of herbicides as is methodologically feasible and

commensurate with other forest operations. All thinning will be from below and basal area stocking will be 50-100 ft.²/ac (60 ft.²/ac recommended) at all times after the age of 25 years. This area will be maintained as replacement habitat until it becomes occupied or until no active colonies for which it might serve as replacement habitat exist within 1 mile of its center, which ever comes first.

II. Foraging Habitat and Foraging Area

A. Definitions

1. Foraging habitat--pine and pine-hardwood stands that are at least 25 years old and that have undergone at least one thinning and currently have a pine basal area stocking of 50-100 ft.²/ac (60 ft.²/ac recommended) in stems in the 10 inch dbh class and larger.
2. Foraging substrate--pine stems in size classes that have been documented to be preferred by the RCW for foraging. Quantity of substrate will be indexed by basal area in stems in the 10 inch dbh class and larger.
3. Adequate foraging substrate--6000 ft.² of basal area in pine stems in the 10 inch dbh class or larger. At least 4000 ft.² will be in stands at least 30 years old. The remaining 2000 ft.² may be in stands at least 25 years old and that have been thinned at least once and have a current basal area stocking of 50-100 ft.²/ac.
4. Foraging area--the pine and pine-hardwood stands that in total contain adequate foraging substrate and other intermingled areas that may be traversed during foraging movements.

5. Zone of influence--the land area within 1/2 mile of the geometric center of the colony area (acreage = 502). It may also be comprised of the 13 forties (520 ac) closest to the geometric center of the colony area. If the normal zone of influence does not contain adequate foraging substrate then it will be expanded until adequacy is met.
6. Contiguous foraging habitat--stands of foraging substrate not separated by non-foraging area stands by more than 10 chains will be presumed to be contiguous.

B. Foraging Area Habitat Surveys

The amounts of foraging habitat in the zone of influence will be estimated based on timber reconnaissance surveys which normally will be made every 5 years. Data tabulation will be according to the format described in Table 3. The legal description code will be according to Rectangular Land Survey methods except where forests are located in states not subject to the Original Public Land Survey. In the latter case, codes will be devised as they are convenient to each forest.

Table 3A describes risk factor coding. Risk factors will range from 1 to 6 with 1 indicating stands in greatest need of overstory removal, from a timber management standpoint, and 6 indicating stands in which no cutting will be done in the next 5 years. Stand identification will be by codes standard to the particular forest.

TABLE 3. Variable names and format for foraging habitat survey data.

<u>Variable Number</u>	<u>Format Columns</u>	<u>Variable Name and Description</u>
1	1-10	Survey forty identification
2	12	Cutting risk factor
3	14-17	Stand identification
4	19-20	Stand age
5	22-23	Stand acreage
6	25-27	Basal area/ac in pine stems in 6" and 8" dbh classes
7	29-31	Basal area/ac in pine stems in 10" dbh class and larger
8	33-37	Total basal area in pine stems in 6" and 8" dbh classes
9	39-43	Total basal area in pine stems in 10" dbh class and larger
10	44-50	Total basal area in pine stems in 5" dbh and larger
11	52-57	Date of survey
12	59-61	Colony number

TABLE 3A. Definitions for cutting risk factor coding in Table 3.

<u>Risk Factor</u>	<u>Definition</u>
1	Regeneration area with residual seedtrees
2	Stand at least 50 years old and ready for regeneration
3	Stand 40-49 years old and ready for regeneration
4	Stand 30-39 years old
5	Stand 20-29 years old
6	Stand less than 20 years old

C. Foraging Area Management

Foraging area management will be commensurate with the forest timber management programs with certain exceptions which will be made to insure adequate amounts and distribution of foraging substrate.

1. Sustaining Adequate Foraging Substrate

Foraging area management will be conducted such that the amount of foraging substrate does not drop below 6000 ft.² BA in pine stems in the 10 inch dbh class and larger and in stands at least 25 years old. At least 4000 ft.² BA will be stands at least 30 years old.

2. Foraging Habitat in the Colony Area

The colony area will be considered to be part of the foraging habitat.

3. Foraging Habitat Adjacent to the Colony Area

At least 10 acres of foraging habitat will be located adjacent to the colony area at all times.

4. Other Foraging Habitat

All other foraging habitat will be in stands which are not separated by more than 10 chains distance across non-foraging habitat.

5. Foraging Substrate Inadequacy

When the amount and/or distribution of foraging substrate does not meet the above-stated standards within the zone of influence described by 13 forties or the 1/2 mile radius then the zone will be extended until these standards are met.

6. Zone of Influence Overlap

When two colonies are located within 1 mile of each other, then their zones of influence will probably overlap. The foraging area for each will still be managed to meet the above-stated standards for foraging substrate, i.e., 6000 ft.² BA in stems 10 inches and larger dbh. The foraging area for a colony will not extend more than one-half the distance between the geometric centers of the two colonies.

7. Restrictions on Cutting, Hauling, and Skidding

There will be no restrictions on methods or timing of cutting, hauling, and skidding of timber within the zone of influence of a colony area except within the colony area.

8. Restrictions on Prescribed Burning and Herbicide Applications

There will be no restrictions on methods or timing of prescribed burning and herbicide applications within the zone of influence on a colony area except within the colony area.

9. Planning Regeneration Cutting

When planning regeneration cutting on an area regulation bases, the district forester will be guided by the principle that the zone of influence will contain foraging substrate on at least 80 ac in stands at least 30 years old and stocked at no less than 50 ft.² BA/ac and on no less than 40 acres in stands 25-29 years old and stocked at no less than 50 ft.² BA/ac. Furthermore, this substrate must be in the sawtimber size class.

III. Monitoring

A. Colony Area Status

Each colony area will be checked during each normally scheduled reconnaissance survey, or more often as is appropriate to need, to determine its activity status. Changes in number of cavity trees and cavities in various condition categories will be recorded.

B. Discoveries

Discovery of both colony abandonment and colony creation will be a continuing process and will be monitored in concert with the ongoing timber reconnaissance and marking activities which result in every stand normally being entered approximately every 5 years.

IV. Multiple Ownerships

In situations where the 0.5 mile radius circle with the colony area at its center encompasses more than one ownership, the USFWS 1989 Guideline will be followed: "The approach is to divide responsibility among landowners involved based upon the amount of foraging habitat available on each property prior to any habitat removal." (P. 12, paragraph 4). Upon discovery of this situation and when it involves Georgia-Pacific land, a Georgia-Pacific representative will notify the USFWS. The USFWS will have the responsibility of informing all landowners directly involved. Also, the USFWS will designate proportionate responsibilities for habitat maintenance.

V. Management Plan Review and Revision

This management plan will be reviewed and revised every 5 years as is appropriate to new research findings on RCW ecology and management and discoveries of the practicability of the strategies proposed here.



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BEFORE THE
SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
OF THE
HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES

STATEMENT OF
MICHAEL J. BEAN

CONCERNING
HABITAT CONSERVATION PLANNING
UNDER THE ENDANGERED SPECIES ACT

JUNE 16, 1993

National Headquarters

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Two years ago, in collaboration with colleagues at the World Wildlife Fund, I undertook a study of the experience with "habitat conservation planning" under the Endangered Species Act. That study, entitled "Reconciling Conflicts Under the Endangered Species Act: The Habitat Conservation Planning Experience," offered a number of recommendations for improving the habitat conservation planning process and remedying some of the recurrent problems with habitat conservation planning efforts. In the relatively short time since that study was released, the body of experience with habitat conservation plans ("HCPs") has greatly increased as the number of plans completed or in progress has risen dramatically. Much of the experience acquired since release of the report has reaffirmed the need for many of the recommendations it made. In my testimony today, I want offer a number of suggestions about the role that habitat conservation planning should play in the overall endangered species conservation effort and the actions that should be taken to improve its effectiveness.

My principal conclusions and recommendations can be summarized as follows:

(1) Habitat conservation planning has the potential to resolve endangered species conservation and development conflicts creatively and flexibly. It can simultaneously address the needs of several imperiled species over significant geographic areas encompassing multiple land parcels and land owners, and, by involving those land owners, enhance the likelihood of acceptance of the plan's goals and cooperation in attaining them.

(2) Effective habitat conservation planning isn't easy. There is an inherent tension between the desire of landowners, on the one hand, to secure long-term certainty with respect to their endangered species obligations and to avoid the revision of those obligations each time a new species is added to the endangered list, and, on the other hand, the desire to know their obligations quickly. The more species and the larger an area a plan encompasses, the longer it is likely to take to acquire and assess the biological information necessary to underlie a credible conservation plan.

(3) Habitat conservation plans are the mechanism whereby landowners and others secure relief from potential liability for "taking" listed species. Thus, the incentive to participate in habitat conservation plans absolutely depends upon maintaining the perception (and the reality) that the government has the will and ability to enforce the Endangered Species Act against violators. Where the government is perceived as unable or unwilling to enforce the Act, there is no incentive for anyone to pursue a habitat conservation plan. To give one concrete example of this, a recent decision of a U.S. attorney in Florida not to prosecute after a highly publicized incident in which a landowner, after having been advised

in writing against doing so, went ahead and cleared land occupied by several threatened Florida scrub jay family groups, may undermine local landowner interest in pursuing a habitat conservation plan for that species.

(4) The soaring interest in habitat conservation planning poses major challenges to the Fish and Wildlife Service. Among other things, it creates enormous new demands to be at the table throughout a protracted series of meetings, planning sessions, negotiations, and other processes that comprise the conservation planning effort. Local governments and local development interests are reluctant to commit to a lengthy and expensive planning process unless the Service actively participates. The Service needs more field staff to catch and keep up with the pace of habitat conservation planning.

(5) The skills needed for effective participation in habitat conservation planning are broader than those normally needed by the Service. Biology is an important part of habitat conservation planning, but it is only one part. For the Service to get the most out of habitat conservation planning, it needs enhanced staff expertise in land use planning, economics, public and private finance, and related disciplines. The image and skills of the "game warden" are as relevant to habitat conservation planning as the blacksmith is to modern transportation.

(6) Because HCPs are new, they represent a sort of experiment in new approaches to conservation. Intelligently judging the success or failure of that experiment will require a significant commitment to monitoring the actual implementation of approved plans. This commitment will require additional staff resources as more plans are approved. In the case of the Clark County, Nevada plan for the desert tortoise, the Nevada Department of Wildlife has documented a continuing set of compliance problems that remain uncorrected for over a year, and parts of that three-year plan remain unimplemented two years.

(7) The Fish and Wildlife Service has not yet developed an institutional mechanism to provide uniform guidance to the field or to ensure consistency of policy and approach among HCPs. Instead, field staff have largely struggled with each new plan on an ad hoc basis, making up the rules as they go. The quality of plans developed under these conditions is entirely dependent on the efforts of field staff and the willingness of their supervisors to provide them with appropriate resources. Only one region has developed formal guidance to supplement the skeletal provisions of the Service's published regulations regarding HCPs. Only one region has formally designated an HCP coordinator. There is an urgent need for the Service to establish, at both the national and regional levels, a core staff of HCP specialists who can provide the guidance, oversight, and consistent policy direction needed to the full potential of habitat conservation plans to contribute to the Act's conservation goals is realized.

(8) Experience to date strongly suggests that it is unwise to seek to mitigate the impacts of private land development by "improving" conservation management on federal lands. This is the strategy underlying the Clark County, Nevada desert tortoise plan. Some of the propaganda being circulated against the Endangered Species Act characterizes that plan as allowing development on some 20,000 acres of land in return for "conserving" some 400,000 acres. The propaganda never points out that all of the land to be "conserved" is existing federal land, including nearly 70,000 acres of National Park Service land. Federal land managers already have a duty to manage their lands so as to avoid jeopardy to listed species, as well as a duty to minimize any incidental taking of listed species caused by authorized land uses. The additional increment of federal land protection being secured by the HCP in return for continued destruction of tortoise habitat on private land is of dubious moment. In practice, the Clark County plan has treated federal land as "conserved" once the grazing allotments for those lands have been purchased. The practical impact of this for tortoise conservation has been limited by the fact that some of the purchased allotments have been inactive for several years (i.e., there were no cows to take off the land), and cattle grazing may be reintroduced if the results of an ongoing Bureau of Land Management study permit it. The plan requires also that all vehicular traffic be confined to designated (signed) roads and that some roads be closed before the land is considered "conserved." In fact, however, taking of tortoises in Las Vegas was permitted as soon as grazing allotments were purchased and more than a year before any roads had been officially signed. To this date, only a few miles of roads (all of them BLM roads) have been closed. Meanwhile, Clark County has claimed hundreds of miles of dirt tracks in the ostensibly conserved areas as county roads pursuant to a nineteenth century federal law known as Revised Statutes 2477. None of these has been closed. Restrictions on mining activities within conserved lands amount to a restatement of preexisting law on that subject. In short, the Clark County experience shows that little conservation has been accomplished as a result of the plan that was not clearly within the authority of the federal land managing agencies even without the plan.

(9) There is need to clarify the respective spheres of habitat conservation plans under Section 10 and the interagency consultation process of Section 7. A federal permittee has his incidental take mitigation obligations defined through the Section 7 consultation process. Typically, that process produces a result much more quickly than the HCP process of Section 10, and the perception exists that the conditions likely to be imposed as a result of a Section 7 consultation will be less, or at least no more, onerous, than the requirements ultimately imposed through the HCP process. As a result, given the choice, any rational person would choose the Section 7 process over the HCP process. The recently introduced bill by Congressman Tauzin would give that choice.

The Tauzin proposal purports to be based upon a desire to put federal permittees and others on a more equal footing. That is a worthy objective. However, the means of achieving it are almost certain to bring an abrupt halt to habitat conservation planning because few, if any, landowners are likely to choose to participate in an HCP over the Section 7 process. In short, if the Tauzin proposal becomes law, the past decade's experiment with habitat conservation planning, and the progress it has made toward more comprehensive planning that encompasses large areas and multiple ownerships, will end.

This would be particularly unfortunate, in my view, if none of the serious problems that currently exist with the way incidental taking is handled under Section 7 are corrected. First, there is no duty to mitigate the incidental taking of listed species in connection with Section 7 actions. Continued losses of individuals of any endangered species, without fully compensating mitigation, can only push that species away from the Act's goal of recovery and toward extinction. According to the Fish and Wildlife Service's 1990 status report, 57% of all then-listed species were either known to be declining or of unknown status. Despite that fact, incidental taking, without compensatory mitigation, is regularly authorized for many of these .

Second, even those conditions imposed to minimize incidental take are not binding. They merely serve to advise a party what he must do in order that any incidental taking he causes not be a violation of the Act. If he violates the conditions, that fact alone is not sufficient to establish a violation of the Act; the Fish and Wildlife Service must prove both that the condition was violated and that an incidental taking in fact occurred. Proving the latter is often virtually impossible in the absence of a freshly killed carcass to establish the fact of a taking. That is a very large part of the reason that so few prosecutions of incidental taking have ever been brought. Unless these deficiencies in the current Section 7 mechanism are corrected, offering the option of invoking Section 7 instead of participating in an HCP will destroy the considerable potential that HCPs have to solve endangered species conflicts creatively and comprehensively.

(10) Finally, there is a clear need to begin conservation planning efforts as early as possible. Early planning will maximize the opportunity for flexibility, reduce the likelihood of irreconcilable conflict, and increase the chance of successful conservation. To date, most communities have not begun the planning process early, but have instead waited until the eleventh hour. In part, this delay is attributable to the cost of carrying out the biological and other studies that must underlie a sound plan. To provide the resources that would enable local communities to get ahead of the curve in their planning efforts, a revolving loan fund or similar grants program would seem to be highly meritorious. Bills recently introduced by Representatives Studds, Saxton, and

others in the House, and Senators Baucus, Chafee, and others in the Senate, include such a financing mechanism and make it available for communities willing to begin the planning process for species that are candidates for future listing. This is a commendable approach that should help avert conservation and development conflicts.

In conclusion, habitat conservation plans have considerable potential to resolve endangered species conservation challenges creatively and successfully. They will not automatically produce that desirable result, however. Organizational changes within the Fish and Wildlife Service, resources of a type and quantity commensurate with the challenge of habitat conservation planning, and a will to enforce the Act vigorously are essential to realizing this potential.

SUBMITTED FOR THE RECORD, MERCHANT MARINE AND FISHERIES COMMITTEE, ENDANGERED SPECIES ACT REAUTHORIZATION AND EVALUATION OF HCP'S, BY TEXAS FARM BUREAU PRESIDENT, S.M. TRUE, JR.

JUNE 16, 1993

MR. CHAIRMAN, THE TEXAS FARM BUREAU APPRECIATES THE OPPORTUNITY TO SUBMIT TESTIMONY FOR THE RECORD, REGARDING PROBLEMS ASSOCIATED WITH HABITAT CONSERVATION PLANS AND THE REAUTHORIZATION OF THE ENDANGERED SPECIES ACT ITSELF.

OUR ORGANIZATION IS PRIMARILY CONCERNED WITH THE THREATENED LOSS OF PROPERTY RIGHTS IF A SPECIES OR HABITAT IS LOCATED ON THE PROPERTY. MANY OF OUR MEMBERS HAVE EXPERIENCED THE LOSS OF PROPERTY RIGHTS AND DEVALUATION OF PROPERTY BECAUSE OF THE PRESENCE OF BOTH THE GOLDEN-CHEEKED WARBLER AND THE RED COCKADED WOODPECKER.

WE AGREE WITH THE STATEMENT OF THE REPRESENTATIVE FROM THE ENVIRONMENTAL DEFENSE FUND IN HIS REQUEST FOR ADDITIONAL FUNDS FOR COMPENSATION FOR PRIVATE LANDOWNERS FOR THE LOSS OF THEIR PROPERTY.

IN OUR OPINION, ANY LEGISLATION WHOSE PURPOSE IS TO PROTECT AND REPLENISH ENDANGERED SPECIES SHOULD DO JUST THAT. SINCE 1973, FEWER THAN FIVE SPECIES HAVE BEEN REMOVED FROM THE ENDANGERED LIST BECAUSE OF REPLENISHING. THIS INDICATES A DISMAL FAILURE OF THE ACT OR AN ERRONEOUS PURPOSE FOR THE ACT.

IN ADDITION, WHILE POSSIBLY WORKING TO THE BENEFIT OF EITHER URBAN CITIZENS OR DEVELOPERS, THE BALCONES CANYON CONSERVATION PLAN HAS BEEN A DISASTER FOR FARMERS AND RANCHERS.

YOUR PROPOSED LEGISLATION (HR 2048) TO ADD CANDIDATE SPECIES TO THE ENDANGERED LIST WOULD ONLY CREATE ADDITIONAL PROBLEMS FOR AN ACT THAT IS ALREADY OVERBURDENED. MOREOVER, IT SEEMS CLEAR THAT YOUR LEGISLATION WOULD FURTHER ERODE THE PROPERTY RIGHTS OF LANDOWNERS.

IT IS EXTREMELY IMPORTANT TO MAINTAIN AND VALIDATE SCIENTIFIC EVIDENCE REGARDING EACH OF THESE SPECIES AND SUBSPECIES. WHILE THE DESIRE MAY BE TO ERE ON THE SIDE OF PROTECTION OF ALL SPECIES, THERE IS AMPLE EVIDENCE THAT THE ACT, EMPLOYING THE CURRENT LIST IS NOT WORKING. ADDING SEVERAL HUNDRED OR EVEN THOUSANDS OF SPECIES TO THE LIST SEEMS COUNTERPRODUCTIVE.

IN SUMMARY MR. CHAIRMAN, OUR ORGANIZATION SUPPORTS CRITICAL MODIFICATIONS TO THE CURRENT ENDANGERED SPECIES ACT, SPECIFICALLY THOSE CONTAINED IN HR 1490, BY MR. TAUZIN AND MR. FIELDS.

WE SHARE WITH YOU THE COMMON GOAL OF PROTECTION AND ENHANCEMENT OF SPECIES, BUT WE HAVE A DIFFERENCE OF OPINION AS TO THE SOLUTION. WE DO NOT FEEL THE STATUS QUO IS ACCEPTABLE. WE LOOK FORWARD TO WORKING WITH YOU AND YOUR COMMITTEE AS YOU CONTINUE THESE DELIBERATIONS.

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Statement of John C. Lewis
President
Hill Country Property Owners Association

on Habitat Conservation Planning
Under Section 10(a) of the Endangered Species Act

House of Representatives
Merchant Marine and Fisheries

June 29, 1993

The Hill Country Property Owners Association is an organization formed of landowners who, for the most part, live or own land in western Travis County, Texas. With our properties located just west of Austin we represent a large number of the landowners directly affected by the Balcones Canyonlands Conservation Plan.

HILL COUNTRY PROPERTY OWNERS ASSOCIATION

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I read with amazement the comments made by John Sawhill, of the Nature Conservancy, before your committee on June 16, 1993. Many of his comments are at the least misleading, and at the worst bold faced lies.

Habitat Conservation Planning (HCP) in its broadest sense could be useful, but presently it amounts to nothing less than regionalized extortion. Since the U.S. Fish and Wildlife Service lacks the funds to come in to an area and buy preserves they see the HCP's as their best alternative.

I would first like to comment on some of his statements before I make my own.

Statement: Mr. Sawhill claims to have "aided in the solution of the Savings and Loan crisis by purchasing several thousand acres of habitat held by the RTC." (Page two)

Fact: They purchased the property from the RTC in a fast growing area of Austin for only \$1,500 per acre, while refusing to let the RTC sell to persons who were more than willing to pay much more. It is "contributions" like this that helped make the Savings and Loan crisis as large as it was.

Statement: "The Balcones HCP (BCCP) also protected two tributaries of the Lower Colorado River that are an important drinking water supply for the City of Austin." (Page two)

Fact: The Balcones HCP not only has not been implemented, but is currently dead in the water due to the lack of a dependable funding source. Further, the two tributaries he speaks of provide less than 2% of the drinking water for Austin. That's not a misprint. Not 20%, but 2% of our water supply.

Statement: "HCP's are built on the consensus process. (Page two) No interest was excluded from the process. Individuals and the public at large were provided ample opportunities to participate through a variety of forums." (Page 5)

Fact: The BCCP committee was carefully put together with environmentalists, public officials and bureaucrats that never questioned the science, or the cost. The landowners were purposely excluded from the process. No one from our group has ever been contacted by the committee, U.S. Fish and Wildlife or the Nature Conservancy. Only months after the Plan was agreed upon by those mentioned above did

they reluctantly put one landowner out of 17 people on the committee. After years of work the BCCP has not been enacted, has no funding source and only 21½ of the affected property owners see the BCCP as the solution to the problem.

Statement: "The BCCP economic impact statement showed that the cost of the regional HCP was nine times less expensive than compliance with Section 10(a) (Page 6)."

Fact: Only if you happen to own a very small piece of property. This is not true with larger properties.

Several years ago Austin property owners found out what it is like to have to deal with the unfairness of the Endangered Species Act. We certainly wanted to help preserve any truly endangered species, but we learned that is not what this is all about. The U.S. Fish and Wildlife are being used, in many cases, to stop growth in many communities by listing species that probably are not endangered at all. The problem is without peer review the U.S. Fish and Wildlife can list anything and hope you don't have the money, time of patience to fight them.

The more offices they open the better chance of advancement in the service. The more HCP's the more need for offices.

In Austin several species were identified and listed with one probably truly being threatened while the others (golden cheeked warbler and various cave invertebrates) were very, very questionable. While their habitat spread over some 40 counties all of the preserves were required where they would stop growth in western Travis County. Land acquisition was demanded in the area requiring close to \$100 million in acquisition funds while we could have moved over a couple of counties and bought four of five times the land for half the price, or less.

We in Travis County were told by U.S. Fish and Wildlife that the birds might not move over to the preserve and that money was no object in protecting endangered species. Further, it's easy for U.S. Fish and Wildlife to say money is no object when it's not going to be their money.

The BCCP committee was formed upon the recommendation of the Nature Conservancy and stacked accordingly. All the while the refusal of U.S. Fish and Wildlife to allow people to build houses, roads and subdivisions slowly lowered property values, which made it easier to acquire properties as preserve land. Land ready for homes soon went from, in some cases, \$20,000 per acre to \$2,000 per acre.

Still the BCCP had a problem. With little federal money and big plan (90,000 acres of preserves) a plan was devised to identify

potential habitat and force anyone wanting to develop in that area to pay a large fee that would go to purchase and manage preserves in the same area. Bureaucrats envisioned millions coming in through this method.

A group was formed by the Travis County Commissioners Court (the only group to doubt the funding source) that would once and for all poll the landowners to see if this much development was forthcoming. The results of this poll startled the BCCP committee and caused them to rethink this funding method. The property owners did not plan to sell to developers nearly as quickly as the committee members had hoped. Further, the landowners did not trust the committee, the U.S. of the Fish and Wildlife to implement a fair plan.

The commissioners recommended a county wide building permit fee that would spread the cost out to everyone in our community. It was still unfair, but better than picking on people whose property values had already plummeted.

The Texas legislature failed to approve this source of funds and is opposed to this, or any similar method, and feel the federal government should pay for any federally mandated program. After all, these species are being saved for everyone, not just the people in our community.

When we, as a country, decided to preserve the lands that are now our national parks did we extort the costs of the parks purchase and management from the people who happen to own the land near the parks? Of course not. The Endangered Species Act should be no different.

A perfect example of how out of control the Endangered Species Act can be is the proposed listing of the Barton Springs Salamander. This small creature has been found in a popular swimming hole called Barton Springs.

No scientific study has been done, but a listing was requested by some "no growth" assistant professors from the University of Texas. The U.S. Fish and Wildlife have indicated they will probably list the salamander regardless of the lack of scientific data and refuse to discuss why.

The head of the U.S. Fish and Wildlife in Texas, Sam Hamilton, bending to "politically correct" pressure has stated that possible mitigation will be to restrict growth in 150 square mile area by up to 90%, but allow thousands to continue to swim and picnic immediately upon the salamander's only known habitat. That means you can swim with them, piss on them, step on them and chemicalize them, but you cannot live within miles of that same water because you might disturb their swimming pool habitat.

Three weeks ago the Williamson County Commissioners Court filed a formal petition to have the cave invertebrates delisted due to lack of supporting science. We are told that while the U.S. Fish and Wildlife will deny the request for delisting the following trial in court will have a different outcome.

Next the golden cheek warbler is to be challenged in court and will most likely have a similar outcome.

Unfortunately the U.S. Fish and Wildlife has thrown out good science and taken up the stop growth agenda in many areas besides Austin. They have hurt their support in our community by trying to be too "politically correct".

While HCP's could be successful if they were landowner driven the current approach by U.S. Fish and Wildlife and the Nature Conservancy will never work.

Please look over the Travis County Landowner Survey and realize that this great community support that John Sawhill speaks of does not exist and his BCCP in Austin, Texas is a complete failure at this point.

We need an Endangered Species Act that is realistic and fairly applied. Don't let it be used by the "no growers" as the U.S. Fish and Wildlife Service is doing in Austin.

Thank you for the opportunity to present our position.

WRITTEN COMMENTS OF ROBERT R. BRANDES
MEMBER BALCONES CANYONLANDS CONSERVATION PLAN EXECUTIVE COMMITTEE
SUBMITTED TO THE HOUSE OF REPRESENTATIVES
MERCHANT MARINE AND FISHERIES COMMITTEE
ON HABITAT CONSERVATION PLANS UNDER THE ENDANGERED SPECIES ACT

Thank you for the opportunity to submit these written comments and accompanying exhibits on Habitat Conservation Plans (HCP) under the Endangered Species Act (ESA).

I was appointed to the Balcones Canyonlands Conservation Plan (BCCP) Executive Committee as a Landowner or Landowner's Representative approximately two months prior to the Committee's approval of the February 1992 Draft Plan of the BCCP. Prior to my appointment there was strong consensus in the Austin, Texas, landowning community that there was no landowner, as opposed to developer, representation on the BCCP Executive Committee.

This committee had been working for some three years trying to draft a regional HCP for the Austin, Texas, area. Throughout the drafting period the landowning community had consistently complained that their concerns were not being addressed in the planning process. I refer to landowners as the small, non-professional, politically unsophisticated, urban, rural and farmer/rancher landowners as opposed to the professional developer whose interests are historically legally well represented and lobbied.

Because a landowner was only belatedly appointed to the BCCP Executive Committee in the last two months of its active existence, there was little or no opportunity to influence the Final Draft of the Plan which by this time had been completed. The result was and is today a Plan that does not take into account the concerns of all, and in the case of the BCCP a significant percentage of, the citizens effected by the Plan.

I am including as part of my written comments a very small portion of my written correspondence and communications generated over the last four plus years. These four exhibits express many of my and also other landowner's concerns regarding the formulation of the BCCP in particular and HCPs in general.

In September of 1991, as a concerned citizen, I addressed the Texas Senate Natural Resources Committee. The general text of those comments I submit for the record.

In February 1992 the BCCP Executive Committee voted to approve the Draft Plan of the BCCP. I voted for passage. My vote was cast without comment and with the understanding that each committee member would be allowed to submit written comments to be attached to the Plan. Thus enabling future readers of the plan to benefit from the thoughts and observations of the various interests then represented on the BCCP Executive Committee.

From a practical standpoint, this was the only opportunity for the landowning public to express at least a portion of their concerns. This was very important to landowners. Unfortunately, the comments were not attached to the plan as agreed. And the plan was widely distributed to the public with none of the committee's comments, suggestions or dissenting views available. As a result, anyone who read or studied the initial versions of the BCCP were given both a distorted and sanitized view. It was not until the October 1992 "Pre-Application Draft" version of the plan was printed and distributed that the comments were attached. By then the damage was done. My February 1992 "Comments/Clarifications/Amendments" to the BCCP are provided for inclusion in the record.

Two letters are also provided for inclusion. One dated 19 August 1992, to Texas Governor Ann Richards and one dated 01 September 1992, to Ygnacio D. Garza, Chairman, Texas Parks and Wildlife. Both letters express some of my general concerns regarding the BCCP and its adoption implications.

I would also like to make a few observations for the record:

HCPs are, from the public's and proponents points of view, one method of preserving and saving endangered species. But HCP's have a more sinister side. That is they create an enormous battle over development rights---who gets them, when they get them, where they get them and how much they cost.

As a result of the enormous economic benefits derived from obtaining these development rights extremely powerful private and political forces come into play. In the case of the BCCP, these forces quite often appeared to work for their own special interests and to the disadvantage of the general landowning public and at times the public interest. I feel certain that because the landowner and public interest often collided head on with other interests the best decisions were not always made. Community-wide solutions are a must. No one special interest, be it environmental, developer, landowner or political, can be allowed to unduly influence the process.

For an HCP to have any chance of success all parties must be made a part of the process from the very beginning and steps must to be taken to keep special interest influence at a minimum. Without the goal of a community wide solution, any HCP has a good chance of failure.

US Fish & Wildlife needs to become more a part of the solution than a part of the problem. USF&W should facilitate the process by giving definite and definitive answers to questions that normally arise during the HCP development stages. They need to give what has been in Austin referred to over and over as "certainty" to the BCCP's (HCP) process. A community struggling to design a HCP simply cannot confidently build a HCP based on "may's and maybe's" from the very federal agency (USF&W) charged with the plan's approval and enforcement. The direct result of such indecision and lack of firm guidance is a HCP with a foundation of clay. This is a serious ongoing flaw in the HCP program.

One significant modification that would remove much of the uncertainty would be to let the HCP applicants, should they so decide, require USF&W to manage the preserves. That would shift the responsibility for the success of the HCP, once approved, to the responsible federal agency where it should have been all along.

Federal funding must be made available. It is readily apparent that 100% local funding for the BCCP is, if not impossible, of a highly suspect nature. The burdens placed on landowners and the local communities by the Endangered Species Act and the resulting HCP solution is quite possibly a financially impossible one. Realism must replace an unreasonable federal attitude in this all important area if HCPs are to succeed.

The HCP process needs to be streamlined. In the BCCP's case, work has been ongoing for over four years. Given the best possible case, it will still take an unknown number of years to complete the preserves. In the meantime many landowners are denied use of their land. Yet they still have all the expenses associated with land ownership. The process must be shortened if for no other reason than fairness.

These are by no means all of the problems associated with the complicated issue of HCPs. But they are some of the significant ones that I see.

Thank you again for the opportunity to submit these comments

14 JUNE 93

Tom Melios
Ford Bldg.
Washington, DC

DEAR TOM —

As we discussed, I'm submitting the documents attached to this letter for inclusion in the official record of the Merchant Marine and Fisheries Committee's 16 JUNE 93 hearing of the Endangered Species Act's Habitat Conservation Plans or Planning section.

Please let me know if I can be of assistance in any of the hearings

Sincerely,

PP Brandes

19 August 1992

Ann W. Richards
Governor
State of Texas

Dear Governor Richards:

Thank you for your reply to my letter expressing concern over the U.S. Fish and Wildlife Service's enforcement of the Endangered Species Act within our state.

I could not agree with you more in that we need to put aside the distorted rhetoric of confrontation. But what is currently taking place in Travis County is a direct result of the very distorted rhetoric we need to avoid. Political ambitions, personal gain and private agendas are promoting a punitive, onerous and precedent setting endangered species program in Texas.

I am sure that Texas' citizens, many of our elected officials and possibly even you, our Governor, are not receiving the full and accurate story of the implications and statewide impact of adoption of the Balcones Canyonlands Conservation Plan's format. That, under the guise of solving the endangered species problems for the Austin/Travis County area, the BCCP as drafted, primarily addresses the concerns of a variety of influential special interests at the expense of traditional solutions and the historic property rights so cherished by Texans. There are alternatives. There are the traditional and other workable solutions to saving endangered species that are being conspicuously ignored and avoided.

I have been following the BCCP since its very inception and while a member of the BCCP Executive Committee. I continue to be an outspoken critic of the backroom trade offs and ongoing suppression of full disclosure that is a driving force behind the plan. The willingness of some to sacrifice for personal or political gain a significant part of Texas' heritage along with our historic landowner's rights is both treacherous and appalling.

The BCCP is not an insignificant/local event. A very fundamental part of our--yours and mine--Texas heritage is being attacked. My concern is that many of the very people who were elected to help preserve that heritage are not being told the entire story of the BCCP and its ramifications. My greatest fear is that you, our Governor, are not being told all the facts.

Governor Ann Richards

Page 2

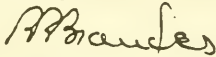
I urge you to solicit input from the opposition to the BCCP. To hear both sides of this story. The BCCP is not as publicly presented. If the BCCP format is adopted it will do irreparable harm to our state and to land ownership/stewardship as we understand it today.

We need a plan. We do not need the BCCP. There are traditional, better and eminently fairer ways to accomplish the same environmental goals without the destruction of some of Texas's most cherished beliefs.

Governor Richards, time is rapidly running out. From one Texan to another, for the good of our state and its landowners, I appeal to you to look into this situation before it ~~is~~ becomes irreversible. The BCCP with its far reaching, little understood ramifications may well be one of the most important events to take place during your governorship. Do not underestimate its ultimate impact.

If I can be of any help, I will be available at your convenience.

Sincerely,



Robert Brandes
PO Box 5808
Austin, Texas 78763

512 327-7366

01 September 1992

Mr. Ygnacio D. Garza
Chairman
Texas Parks And Wildlife Commission
Brownsville, Texas 78520

Dear Chairman Garza:

Political ambitions, personal gain and private agendas are promoting a punitive, onerous and precedent setting endangered species program in Texas. I am sure that Texas' citizens, many of our State's officials and possibly you are not receiving the full and accurate story of the implications and statewide impact that adoption of the Balcones Canyonlands Conservation Plan (BCCP) will have.

Under the pretense of solving the endangered species problems for the Austin/Travis County area, the BCCP as drafted, primarily addresses the concerns of a variety of influential special interests at the expense more traditional solutions and the historic property rights so cherished by Texans. There are alternatives--such as state/landowner co-operative agreements. There are other time tested solutions to saving endangered species that are being conspicuously ignored and avoided.

Federal control and management of State and private lands using the Endangered Species Act as the vehicle seems to be the primary goal with saving species the emotional driving force. This current fight is all too reminiscent of the historic battle that Texans once fought and won over who controls offshore drilling rights. If we don't stand up once again for our historic rights we will lose them.

I have followed the BCCP since its inception and while a member of the BCCP Executive Committee. I continue to be an outspoken critic of the backroom trade-offs and ongoing lack of full disclosure that to this day poisons the integrity of the plan. The willingness of some to sacrifice for personal or political gain a significant part of Texas' heritage along with our historic landowner's rights is both treacherous and appalling.

The BCCP is not an insignificant local event. A very fundamental part of our--yours and mine--Texas heritage is being attacked. My great concern is that many of the people who are in a position to help preserve that heritage are not being told the entire story of the BCCP and its ramifications.

Chairman Y. D. Garza

Page 2

I urge you to solicit input from those opposing the BCCP and listen to both sides of this story. The BCCP is not as publicly presented. If the BCCP format is adopted, it will irreparably harm our state and traditional land owner stewardship as we Texans understand it today.

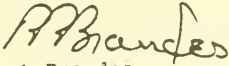
We need a plan. We do not need the BCCP. There are previously tested, proven and eminently fairer ways to accomplish the same environmental goals without the destruction of some of Texas' most cherished beliefs.

Time is rapidly running out. From one Texan to another, for the good of our state and its landowning public, I appeal to you to look into this situation before it becomes irreversible. The BCCP with its far reaching, little understood ramifications may well be one of the most important events to take place during your tenure. Do not underestimate its ultimate impact.

Enclosed is a copy of my comments and clarifications that was requested of all BCCP Executive Committee members. The "comment portion" of the Plan is only being selectively circulated by the City of Austin and has not been attached to the Plan as required by the BCCP's authorization resolution.

If I can be of any help, I will be available at your convenience.

Sincerely,



Robert Brandes

PO Box 5808

Austin, Texas 78763

512 327-7366

cc: Texas Parks And Wildlife Commissioners

Enclosure

TO: SENATE NATURAL RESOURCES COMMITTEE
 FROM: ROBERT R. BRANDES
 DATE: 15 MAY 91
 RE: SB 1015

Attached please find:

1. General text of comments
2. Additional documents

Please feel free to call on me should you require further information.

ROBERT R. BRANDES
 P.O. BOX 5808
 AUSTIN, TEXAS 78763
 512 327-7366

Thank you for the opportunity to speak on this issue.

The bill you are considering passing has implications far beyond the obvious. It has the potential to enormously impact, with devastating results, land use and ownership throughout the entire state of Texas. In my opinion, the effects of passage of this bill will not be those of a localized bill. You are most likely writing the format for national law.

The environmental community has on many occasions stated that the results of the Austin area efforts will be the model for the future. This model will surely include one or more versions of the Austin scenario packaged with this precedent setting legislation you are now considering.

FOR EXAMPLE:

--First a geographic eco-system wide area is specifically targeted as environmentally sensitive. This could be rangeland, coastal areas, hill country areas (such as Austin), East Texas woods, Big Bend, etc.

--Then a well orchestrated series of real or imagined Endangered Species Act violation complaints will result in immediate stringent and possibly unreasonable enforcement of the ESA by the US Fish & Wildlife. This enforcement brings about an almost instantaneous community wide real estate paralysis, a plummeting tax base and numerous local financial problems. These first two events are exactly what is happening here in the Austin area today.

--The stage is now set to bring this pre-packaged solution to the targeted community with the comment "Here is the solution to your problem that worked so well in solving Austin's similar situation".

--The community has little or no choice but to accept or face continued and expanded economic devastation

So, if there are doubters that the above frightening scenario is not possible, one only need review the strict enforcement record of the ESA by the US F&W coupled with the litany of abuses occurring today by portions of the environmental community of the once good intentions of the Endangered Species Act. Ladies and gentlemen, please make no mistake about it, this is very serious and very real. And you legislators, through the passage of this act, are becoming possibly the most important piece of the solution to that carefully orchestrated situation I just outlined.

If, upon passage, this bill does not have strongly worded landowner property rights protections and built in business safeguards and is used, as it most assuredly will be, as a pattern for additional habitat acquisition and endangered species protection it can safely be said this bill will concievably adversely affect the constituency of every legislator in Texas.

There are probably very few areas of Texas that a truly dedicated environmentalist cannot conjure up something on the endangered or threatened species list. And if it's not already on the list, great success has been demonstrated in the listing of new species. So, in all practicality, virtually the entirety of Texas is vulnerable to situations identical to those we face in Austin today. This highly misunderstood situation is definitely by no means a local or Austin problem.

Portions of the environmental community only need this all important enabling legislation to go forward on a rampaging statewide endangered species campaign. And you can be assured the good intentions of this legislation will undoubtedly be abused by some parties not to render useless 10's of thousands of acres but eventually 100's and possibly 1000's of square miles of public and privately owned lands. While at the same time, inflicting massive financial damage not only to individual landowners but also to a great number of communities and taxing districts.

One only need note that under the existing enforcement of the Endangered Species Act financial impact is not considered in that enforcement. In fact, the ESA specifically excludes consideration of economic impact as a factor to be considered in its enforcement. This is by far and away the cruelest feature of the ACT.

As a result, if this well intentioned bill passes without an abundance of very strong safeguards, we are possibly witnessing the creation of the catalyst for one of the greatest MANDATED and financially devastating transfers of land ownership that contemporary Texas will every see.

This is surely one of the most important and least understood pieces of legislation you will be asked to vote on this session. There are very serious subtleties and ramifications for all of us lurking in the depths of this bill. Please, if you decide to pass it, do so with great care.

Would any of you or any of your staff wish to discuss this bill, I will be available at any time.

COMMENTS/CLARIFICATIONS/AMENDMENTS
BALCONES CANYONLANDS CONSERVATION PLAN

Submitted by:

Robert Brandes
P.O. Box 5808
Austin, Texas 78763

FEB 1992

**COMMENTS/CLARIFICATIONS/AMENDMENTS
BALCONES CANYONLANDS CONSERVATION PLAN**

I. INTRODUCTION

As a member of the BCCP Executive Committee, I voted to approve the BCCP Draft. I did so in the spirit of community cooperation so that a plan could progress to the next developmental phase at the government entity level.

However, my vote was cast with tremendous reservation. I remain deeply concerned by this flawed and inequitable plan.

Hopefully, a fair plan can be formulated. Failure to do so would harm the environment, the community, and the landowning public. All interested parties must work together to find an equitable solution. And all interests must be represented fairly or the solution will not be equitable.

II. CONCERNS AND RECOMMENDATIONS

This document is forwarded for attachment to the BCCP February, 1992 Draft and for consideration by the various governmental entities charged with the responsibility of drafting a plan to be submitted for voter approval.

The following are concerns, recommendations and amendments. Among my primary concerns are those inequities directed at the landowning public; especially, the small, rural, and unsophisticated landowners. Landowners:

- a. have concerns and interests that are not adequately represented in the BCCP Plan. This is because a "Landowner Representative" was belatedly appointed to the Executive Committee less than two months prior to the final approval vote of the BCCP Plan, while the Executive Committee was created and appointed four years ago; and
- b. are being asked to assume a disproportionate share of the BCCP's expenses. Any plan that benefits the public interest should be paid for by all members of the public equally.

Because this is a federal law, I believe that the federal government should pay for the plan. At the very least, the final BCCP should require that all available sources of federal assistance be explored and demanded.

For a plan to garner community wide support and avoid the possibility of litigation the many serious deficiencies of the BCCP February, 1992 Draft must be addressed.

The following are areas of potential trouble. Suggested solutions are addressed in the "Proposed Amendments/ Clarifications" section of my comments.

This plan was, from day one, presented as "voluntary." The landowning public was consistently assured of the voluntary nature of the plan. It would constitute a complete breach of faith for that understanding not to be incorporated into the plan.

Amendment #3 is a suggested solution.

It makes no sense to treat the Black Capped Vireo differently from the Golden Cheeked Warbler. If we are going to solve our problems, then let's solve them all. By leaving the vireo in limbo for three and possibly up to six years, the plan is only inviting litigation.

Amendment #8 is a suggested solution.

"Certainty" is critical to everyone involved in the plan. The community must demand certainty and assurances from U.S. Fish & Wildlife that once a plan is in place the listing, discovery or whatever of new endangered or threatened species will not adversely affect anyone in the entire plan area. Without this assurance, there is no guarantee our community will not have to go through this painful exercise again. Our elected officials must stand firm on this issue.

Amendment #13 is a suggested solution.

It makes absolutely no sense not to attempt to arrive at voluntary agreements with landowners apart from fee purchases. The possibility of saving substantial amounts of money and having the co-operation of the land owning public is paramount. The land owning public feels extremely threatened, abused and intimidated. Every effort should be exerted to make the implementation of a plan as painless as possible on those most affected--the landowners. Without this most important consideration the plan is courting disaster. Successful inverse condemnation or other suits could not only wreak havoc on the plan but also our community finances.

Amendment #14 is a suggested solution.

Quite simply, the LCRA should do its fair share.

Amendment #22 is a suggested solution.

Land acquisition should be done in the cheapest manner possible.

Amendment #26 is a suggested solution.

The community as a whole has relied on the Texas Nature Conservancy and its repeated representations that the acquisition projections are reasonable and accurate. If the TNC is the acquisition agent it is not unreasonable to expect them to stand behind the accuracy of their representations. All too often our community has been victimized and subsequently hurt financially by overly optimistic projections that retrospectively were only good to promote a faulty project. One only need refer to the STNP and the Southwest Travis County Road District.

Amendment #27 is a suggested solution.

The "even balance" or so-called 50-50 deal is not workable. This was an agreement reached on behalf of and at the expense of landowners without landowner representation or input. It is onerous, punitive and will most assuredly invite confrontation. This one agreement alone has poisoned the plan and needs to be rectified. Amendment #30 is a suggested solution.

The fees charged to landowners are critical. They must be realistic and fair to the landowner. Any error caused by excessive fees will fatally flaw the plan.

Amendment #31 is a suggested solution.

Many landowners have already lost use of significant portions of their lands due to various ordinances and regulations. It only seems reasonable that they should receive credits for these losses. It is unrealistic and impractical to expect landowners to continually bear a disproportionate share of the cost of this plan and other so called "public good" projects.

Amendment #31 is a suggested solution.

The "priority pipeline" method of allocating lands available for development is totally unfair to the small and unsophisticated and rural landowner.

Amendment #33 is a suggested solution.

It is extremely important to be aware that for the great majority of the BCCP's Executive Committee existence there was no so called "Landowners Representative" on the committee. As a result, the plan was drafted without adequate input or a sensitivity towards the concerns of the landowning public. Yet, these are the people most affected by the plan. There is considerable doubt that any plan will succeed without substantial considerations being given to the concerns of the general landowning public.

Amendment #36 is a suggested solution.

Great consideration must be given to assurances a plan, once started will go on to completion. Nothing could be worse than to have a plan falter in mid stream. It could have devastating effects on our community in general and the landowners in particular. This point cannot be stressed strongly enough.

Amendment Addition is a suggested solution.

COMMENTS/CLARIFICATIONS/AMENDMENTS
BALCONES CANYONLANDS CONSERVATION PLAN

III. GENERAL CONDITIONS/ISSUES

Make it the intention of this plan to require all levels of government--city, county & state--to exert every effort and exhaust every possibility to have the federal government contribute either all or a significant part of the funding of this plan through its co-operative program/s prior to requiring funding of any local nature.

If certain biological reports or studies were available but not used, list them and explain reasons for not using.

Any major unresolved issues--Southwest Travis County Road District, LCRA land contribution, Black Capped Vireo uncertainty and ambiguity, "Certainty" of plan regarding future listings, etc.--be clearly resolved by plan prior to any governmental entitie's approval or public vote.

Have the city, county and state legal staffs research, on behalf of their citizens, the legality of USFWS's:

Interperatation of the Endangered Species Act as it is being applied to Travis County and the State of Texas.

Enforcement of the ESA in Travis County and the State of Texas. Is everyone being treated equally? Is USFWS enforcing beyond the authorization and limits of the ESA?

Representations to the public in general and the landowning public in particular as to their rights and obligations under the ESA. →

Possible violations of property rights under the Fifth Ammdement.

Possible non-compliance of ESA in regards to USFWS's obligations, both of a timely nature and otherwise, to meet their requirements as they apply to the BCCP and the listing requirements of the ESA.

Leave the BCCP or its successor entity/s open to the inclusion of and the opportunity to present to the appropriate entity any additional adjustments or ammendments that any member of this Executive Committe may submit for consideration in the future.

COMMENTS/CLARIFICATIONS/AMENDMENTS
BALCONES CANYONLANDS CONSERVATION PLAN

IV. SPECIFIC AMENDMENTS TO FEBRUARY 1992 DRAFT

1. Amend Section 7.0 (page 7-1):

It is the specific intent of this plan to be a Section 10A and not a recovery plan. If the plan contains elements of a recovery plan then they should be deleted and the plan should be downsized accordingly.

2. Amend Section 7.6.2 (page 7-9):

While values used as indicators of property values were the 1990 and 1991 central appraisal district values, it should be recognized that the actual values may be much higher due to a recovering economy.

3. Amend Section 8.0 (page 8-1):

Landowners, after being notified in writing within 120 days of approval of the HCP by USFWS, who object to their land being included as preserve shall be dropped from the preserve. If, within one year from date of approval by USFWS, ninety per-cent (90%) of the privately owned lands have been acquired or set aside through voluntary means, only then condemnation may be used to acquire the remaining ten per-cent (10%) if it can be demonstrated to be critical to the HCP's success.

It is specifically understood that in-holdings will be allowed within the preserve boundaries if they are of a low density non-commercial use.

4. Amend Section 8.1 (page 8-3):

It is specifically understood that all buffer zones will be contained within the preserve boundaries as approved by USFWS at the time of submission of the 10A permit unless a subsequent voluntary agreement is reached with adjacent land owners and thereby reduce the preserves size requirement.

5. Amend Section 9.1.1 (page 9-7):

To show there is significant funding from the Texas DOT for the cowbird program as part of their HWY 620 mitigation. If there are other existing mitigation agreements of any kind include them here.

6. Amend Section 9.1.1 (page 9-7):

"It is assumed that most of these areas would best be managed for the vireo and not the warbler".

7. Amend Section 9.1.2 (page 9-11):

The amount of warbler habitat in watershed protection zones outside of preserves be included in their entirety and exemptions will be granted.

8. Amend Section 9.2.1 (page 9-25):

All vireo sites--whether in or out of preserve areas--are to be treated in a manner consistent with other bird species in the HCP. Size and configuration of vireo preserve will be included in 10A permit application.

9. Amend Section 9.2.1 (page 9-25):

Delete the last two paragraphs page 9-25.

10. Amend Section 9.3 (page 9-34):

Delete any references to the HCP as a recovery plan and specifically state that the HCP is not required to be and is not to be structured as a recovery plan.

11. Amend Section 10.1.2 (page 10-4):

Add that voluntary landowner co-operative agreements will be encouraged as the preferable means of land "acquisition" and fee simple purchase of lands for the HCP will be considered the alternative.

12. Amend Section 10.3.3.16 (page 10-22):

Killing, including shooting, cowbirds at any time is not to be an option for cowbird control and should be punishable by fines of amounts significant enough to assure this method will not be used.

13. Amend Section 10.4.2 (page 10-25):

HCP boundaries and the preserve boundaries, once they are set at the granting of the 10A permit will not be subject to change for 15 years.

USFWS will guarantee adequacy of the plan to all species listed in the Federal Register/Vol. 56, No.225/Thursday, November 21, 1991/ Proposed Rules and any other species indigenous to the plan area including, but not limited, to various salamander species.

14. Amend Section 11.1 (page 11-1):

Add to first paragraph. Notwithstanding the above, prior to attempting to acquire any lands all avenues of voluntary landowner co-operation will be explored with individual landowners. These will include, but not be limited to: Conservation easements, verifiable private management agreements, leases and other land set aside options.

15. Amend Section 11.2 (page 11-3):

Add to last paragraph--"not subject to direct takings and including all water quality related or any other governmental restricted lands including, but not limited to, the LCRA, but are not"

Amend Section 11.2 (page 11-4):

Category V: Private Ownership/Protected Land Include # of acres

16. Amend Section 11.4.1 (page 11-10):

Add to (4)--"communities and the landowning public."

17. Amend Section 11.4.2 (page 11-11):

Add to Paragraph 2--"As much as possible, but as a minimum...."

18. Amend Section 11.4.3 (page 11-12):

Add to Paragraph 3--Acquisition of additional properties under this section will be strictly on a voluntary basis with condemnation being specifically ruled out as an acquisition option.

19. Amend Section 11.4.4 (page 11-14):

Substitute for first paragraph--The selection of the acquisition agent for the acquisition of lands and other plan operations will be put out for competitive bids to qualified parties with the lowest bid being accepted.

20. Amend Section 11.4.5 (page 11-16)

Include Section 7 permit option in this or the applicable section.

21. Amend Section 11.8 (page 11-21):

Add to the last paragraph--The approved plan will be considered adequate protection for all the salamander species within the plan area.

22. Amend Section 13.2.1.4 (page 13-5):

"By managingSection 11.3, specifically including those listed as undesignated area/s in the February 1992 Appendices, for wildlife...."

Add--The LCRA will not be relieved from CIP assessments by 13.2.1.4.

23. Amend Section 13.7.2 (page 13-14):

Protection of Wild Birds--~~Delete~~--"should be ammended to permit killing the brown-headed cowbird.....guidelines of the BCCP".

24. Amend Section 14.1 (page 14-1):

"Environmental organizations.....threatened species whose environmental philosophies are served by the BCCP be asked, as a show of good faith, to contribute a minimum of 5% of the cash requirements of the plan.;"

25. Amend Section 14.2 (page 14.3):

Add to last paragraph--All bond or revenue proposals will be placed before the voters for public approval or rejection.

26. Amend Section 14.3 (page 14-7):

The first paragraph--Land acquisition should either be done internally by the governmental entities or put out for competitive bids to qualified organizations and the lowest transactional cost bid accepted.

27. Amend Section 14.3 (page 14-7):

"Staff at the Texas Nature Conservancy.....value for this analysis and the TNC be required to give the BCCP a guarantee that their estimates are within 10% of the final acquisition costs and the TNC will reimburse the BCCP for any cost overruns above that amount if TNC is the acquisition agent."

28. Amend Table 14-3 (page 14-8)

Adjust--"Private Owners-Fee Simple Purchase" to show a greater emphasis on landowner co-operative agreements and water quality or other governmental-LCRA required set asides.

29. Amend Section 14.4.2 (page 14-10):

All plan participants should pay CIP manditory assessments.

30. Amend Section 14.4.3 (page 14-12)

Delete--"The consensus approach.....the most equitable funding solution."

31. Amend Section 14.4.3 (page 14-13):

(2) Add--The \$ 3000 per acre fee will only be charged against the actual footprint of the habitat physically destroyed, i.e. cleared or cut. This will specifically exclude charges for buffer zones, fringe areas, other related areas or an interperatation of "take" other than the preceeding sentence.

- (3) Change the gross acreage fee to:
- \$1000 per acre for commercial & multifamily
 - \$ 400 per acre for residential of more than one unit per acre
 - \$ 200 per acre for residential of less than one unit per acre
 - \$ 10 per acre for agricultural/ranching useages

Insure that participation in plan is voluntary and no habitat survey would be required under this section.

- (5) Include Section 7 permits

- (7) Delete entirely

Add--Give credit to landowners who have lost the use of portions of their property either through the CWO, LCRA or other governmental water quality/land useage regulations or have voluntarily taken land out of production--i.e. conservation easements. This credit would be on an acre for, acre basis and be fully transferable without limitation.

32. Amend Section 15.2.2 (page 15-3)

Change "five times or more" to three times & "5-to-1" to 3-to-1.

33. Amend Section 15.2.2 (page 15-4)

Give public improvement projects priority over other projects.

Rather than use the "priority pipeline" which may favor large and sophisticated landowners/developers, accumulate the total acreage available to be developed and pro-rate it among the qualified applicants for the acreage with no one applicant receiving more than their porportinate share--based on the number of applicants rather than their percentage of the total acreage applied for approval. This calculation will be done in six month intervals.

34. Amend Section 15.2.2.2 (page 15-4):

Delete this section in its entirety.

35. Add to the appropriate section:

A cost analysis on a species by species basis of the cost of acquisition of habitat for and related management cost of each species in the HCP.

36. Add to the appropriate section:

From inception in 1988 until January 1992 there was no "Landowner Representative" on the BCCP Executive Committee. A "Landowner Representative" was added to the Executive Committee in January 1992. As a result, for all intents and purposes, the BCCP Final Draft was prepared and drafted without a BCCP "Landowner Representative's" input.



Bill Aleshire

COUNTY JUDGE, TRAVIS COUNTY

Travis County Administration Building
P.O. Box 1748 Room 520
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512 473-9555

TESTIMONY OF COUNTY JUDGE BILL ALESHIRE

SB 880

April 19, 1993

SB 880 IS A PRACTICAL ANSWER TO A COMPLEX ENVIRONMENTAL AND ECONOMIC DILEMMA WE FACE IN TRAVIS COUNTY. I FIRST BECAME AWARE OF THE IMPLICATIONS OF THIS DILEMMA WHEN THE COUNTY WAS PROHIBITED FROM REALIGNING THE INTERSECTION OF COMANCHE TRAIL AND RM 820 TO RESOLVE A TRAFFIC SAFETY PROBLEM BECAUSE IT REQUIRED THE DESTRUCTION OF SOME OF THE HABITAT OF THE BLACK-CAPPED VIREO, AN ENDANGERED SPECIES. COMANCHE TRAIL FROM RM 620, IS THE ROAD LEADING TO THE OASIS RESTAURANT, BOB WENTZ PARK AT WINDY POINT, AND HIPPIE HOLLOW, ALL POPULAR PLACES FOR SWIMMERS, WINDSURFERS, SUNBATHERS AND GAWKERS. THE COUNTY'S PROBLEMS WITH THAT ROAD PROJECT WERE JUST A MINUSCULE PORTION OF THE ENVIRONMENTAL AND ECONOMIC PROBLEMS WHICH HAVE DEVELOPED IN OUR COUNTY.

DEALING WITH THIS SITUATION AS COUNTY JUDGE, I'VE BEEN ANGRY, FRUSTRATED, INDIGNANT, BUT DETERMINED TO FIND A SOLUTION THAT WILL WORK. I FELT THAT THE FEDERAL TREASURY OUGHT TO PAY FOR THE IMPLEMENTATION OF THIS FEDERAL LAW, NOT MY COUNTY OR CITY TAXPAYERS. I HAVE BEEN FRUSTRATED ABOUT THE WAY IN WHICH THE ENDANGERED SPECIES ACT IS APPLIED, THOUGH I STRONGLY SUPPORT THE CONSERVATION OF OUR ENVIRONMENT.

IN SHORT, I HAVE BEEN A 'HARD SELL' ON THE BALCONES CANYONLANDS CONSERVATION PLAN, OUT OF CONCERN FOR ITS PRACTICALITY AND AFFORDABILITY. I'VE STUDIED THE THEORY, THE LAW, THE FINANCES, AND THE BIOLOGY OF THIS PLAN, PAYING ATTENTION APPROPRIATELY TO THE DETAILS.

LEARNING WHAT I HAVE LEARNED AND FACING THE REALITY OUR LANDOWNERS IN TRAVIS COUNTY MUST FACE, I'M HERE TODAY AS A STRONG ADVOCATE FOR SB 880 AND A HABITAT CONSERVATION PLAN FOR TRAVIS COUNTY. THIS LEGISLATION HAS THE UNANIMOUS ENDORSEMENT OF THE TRAVIS COUNTY COMMISSIONERS COURT. FOR ALL THE LEGITIMATE COMPLAINTS THERE MAY BE ABOUT WHY WE ARE IN THIS SITUATION OR WHAT THE FEDERAL GOVERNMENT SHOULD DO DIFFERENTLY, WE MUST FIND A PRACTICAL SOLUTION AND REACT TO THIS SITUATION AS A COMMUNITY. THAT'S WHAT SB 880 ALLOWS US TO DO. THIS BILL IS SIMPLY PERMISSIVE AND PRACTICALLY WILL APPLY ONLY TO MY COUNTY.

MOST OF THE WESTERN PART OF OUR COUNTY HAS BEEN IDENTIFIED AS POTENTIAL HABITAT FOR ENDANGERED SPECIES, AND AS A RESULT, LANDOWNERS ARE PROHIBITED BY THE FEDERAL ENDANGERED SPECIES ACT FROM DISTURBING THIS

HABITAT UNLESS THEY CAN PROVE THAT THEY CAN DO THAT WITHOUT HARM TO THE ENDANGERED SPECIES THROUGH WHAT IS CALLED A HABITAT CONSERVATION PLAN.

BUT THE COST OF SUCH A PLAN TO MOST INDIVIDUAL LANDOWNERS IS PROHIBITIVE. SMALL ACREAGE LANDOWNERS IN PARTICULAR ARE HARD HIT BY THIS SITUATION. AS A COMMUNITY, OUR TAX BASE IS IN JEOPARDY AND WE EXPECT TO SUFFER ECONOMIC LOSS IF THIS DILEMMA IS NOT RESOLVED.

THEREFORE, WE'VE WORKED TO DEVELOP A SINGLE PLAN TO GET ONE COUNTYWIDE PERMIT THAT WOULD PROVIDE HIGH QUALITY HABITAT IN A PRESERVE FOR THE SPECIES WHILE FREEING OWNERS OF THE REMAINING LAND FROM THE REGULATORY RESTRICTIONS OF THE ENDANGERED SPECIES ACT. WHILE WE ARE RELUCTANT TO SEE PRESERVE LAND TAKEN OFF THE TAX ROLL, THAT LAND AND QUITE A BIT OF WESTERN TRAVIS COUNTY WILL DECLINE IN TAX VALUE WITHOUT A HABITAT CONSERVATION PLAN ALLOWING BOTH THE PROTECTION OF THE SPECIES AND THE DEVELOPMENT OF REMAINING LAND.

THAT'S WHAT SB 880 MAKES POSSIBLE. THE CITY AND TRAVIS COUNTY WILL OBTAIN A FEDERAL PERMIT FOR ALL OF TRAVIS COUNTY UNDER SECTION 10(A) OF THE ENDANGERED SPECIES ACT. IF VOTERS APPROVE COUNTY BONDS, AS DID THE VOTERS OF AUSTIN, TO PURCHASE THE PRESERVE LANDS, THEN A BUILDING PERMIT SURCHARGE WOULD BE USED TO PAY FOR THE ONGOING COSTS OF OPERATING AND MANAGING THE PRESERVE. THAT WAY, BOTH CURRENT RESIDENTS (THROUGH PROPERTY TAX-PAID BONDS) AND FUTURE GROWTH/DEVELOPMENT (THROUGH THE BUILDING PERMIT SURCHARGE) WILL SHARE THE COST OF THIS PERMIT. THE SURCHARGE IS NEEDED BECAUSE IT IS IMPORTANT TO TAKE CARE OF THE PRESERVES, MAKING THE PRESERVE HIGH-QUALITY HABITAT FOR THE SPECIES, IN ORDER TO KEEP THE PERMIT FROM U.S. FISH AND WILDLIFE, AND SO THE SPECIES WILL SURVIVE EVEN IF OTHER HABITAT LANDS ARE DEVELOPED FOR HOMES, ROADS, AND COMMERCIAL BUILDINGS.

WITH SB 880, WHEN THE PRESERVES ARE PURCHASED, LANDOWNERS IN TRAVIS COUNTY WILL BE FREED OF ALL RESTRICTIONS UNDER THE ENDANGERED SPECIES ACT FOR THE SPECIES COVERED BY OUR COMMUNITY PERMIT. WE COULD HAVE A HABITAT PLAN/PERMIT WITHOUT SB 880, BUT IT WOULD NOT ACHIEVE THIS RESULT.

REGARDLESS OF COMPLAINTS PEOPLE MAY HAVE ABOUT THE ENDANGERED SPECIES ACT, ITS APPLICATION, ITS LACK OF FUNDING, ETC., WE NEED A SOLUTION FOR OUR COUNTY TO THIS DILEMMA. KILLING SB 880 DOESN'T CHANGE THE FEDERAL ENDANGERED SPECIES ACT AND IT DOESN'T MAKE IT ANY EASIER FOR MY CONSTITUENTS TO COPE WITH THAT FEDERAL LAW, IN FACT QUITE THE OPPOSITE IS TRUE. SB 880 OFFERS A PRACTICAL WAY OF SOLVING THIS PROBLEM IN OUR COUNTY IN THE FORESEEABLE FUTURE, AND WE URGE YOU TO GIVE THIS BILL FAVORABLE CONSIDERATION.

Federal funds can't save BCCP from going 'foul,' Pickle warns

By Ralph K.M. Mauretta
American-Statesman Staff

The Balcones Canyonlands Conservation Plan can be saved, but not with federal funds, U.S. Rep. Jake Pickle warned Wednesday.

"Any assumption that Uncle Sam can come in and bail out this process is fanciful thinking," the Austin Democrat said.

The Balcones plan would establish nature preserves in Travis County for endangered and rare songbirds, cave bugs and other species. Development would be allowed outside the preserves. A bill that would have authorized development fees for managing the preserves died last week in the Texas Legislature.

"Austin was on the verge of national recognition as the first major city to establish a workable environmental system under the Endangered Species Act. We were

on the verge of hitting a World Series grand slam home run ... and we hit a foul ball," said Pickle, a proponent of the plan.

"The worst thing we can do is call it quits. The plan is still viable, still attainable."

Some proponents of the Balcones plan have suggested that the U.S. Fish and Wildlife Service could manage the preserves, at federal expense. Pickle said this would not be possible in the current budget climate, which he described as the tightest he has seen during his 29 years in Congress.

Pickle said community leaders must forge a new funding plan.

Officials of the government entities involved in overseeing the Balcones plan — Travis County, the City of Austin, the Lower Colorado River Authority, the Texas Parks and Wildlife Department and the U.S. Fish and Wildlife Service — have expressed optimism in recent

days that alternative funding mechanisms that don't require legislative approval might be developed.

Pickle also called on local business, government and environmental leaders to "concentrate fiercely" on reaching an agreement resolving development and preservation issues along Barton Creek.

If such an agreement can be struck with Freeport-McMoRan Inc., the developer of Barton Creek Properties, it would then be possible to resolve the financial problems of the Southwest Travis County Road District No. 1, Pickle said.

That, in turn, would clear the way for public acquisition of two tracts crucial for the Balcones plan — the Uplands and the Sweetwater Ranch.

Bill Aleshire

COUNTY JUDGE, TRAVIS COUNTY

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 512 473-9555

Thursday, June 3, 1993

The Honorable J.J. Jake Pickle
 Member of Congress, 10th District
 U.S. House of Representatives
 Washington, D.C.

Dear Jake,

RE: STATESMAN Story today. Okay, I'm guilty of fanciful thinking. I think the Endangered Species Act is one of the most noble statutes ever enacted by any society. Only a sophisticated and caring society could recognize the importance of limiting human behavior so as to avoid reducing the biodiversity of our environment. The message of the Act is simple and noble: We will live on this Earth gently and respectfully.

That's fanciful thinking, I admit.

I think that a legislative body that enacts such a noble law should take full responsibility for funding its implementation. To implement the Act, it takes scientific research and analysis, surveys of potential habitat land, permanent preservation through acquisition and conservation easements of habitat, and ongoing, proper management of such preserves. Not one of these essential elements for implementation of this noble law is properly or sufficiently funded by the Federal government.

Without adequate funding of such a strong Federal law, regulation is applied in a blurred, unproductive fashion, as is occurring here in Travis County. For example, to this day no one has identified with clarity what land is and what land is not subject to restrictions under the Endangered Species Act in Travis County. This is a noble national policy that is deserving of adequate support from the Federal Treasury.

I see nothing wrong with those of us in Texas helping (through Federal taxes) to preserve the Spotted Owl while the folks in the states of Washington and Oregon help pay for preservation of the Golden Cheek Warbler here in Texas. I expect folks who say they support this noble bill to be willing to fill the till. Perhaps that's fanciful thinking, as well.

I think this is NOT a "local problem." I think saying that it is a local problem will doom this Act and the species and the overall quality of our environment. To place heavy financial responsibility on certain local communities and expect successful implementation of the Act for mobile species that don't recognize a city limits, county line, or state or national border is fruitless thinking. Without a national or international approach, it's like building the left side of a dam...what we do won't work, no matter how good that side of the dam is.

The way this system works now, habitat is allowed to be destroyed

until the species is almost annihilated, then we regulate. Therefore, those who destroy habitat early and begin the destruction of the species pay nothing, while those who conserve the habitat the longest are the only ones who are subject to regulation and expense under the Act. As Bruce Babbitt has advocated, as a nation we've got to be more proactive and comprehensive in our quest to avoid the elimination of species and to encourage healthy biodiversity.

Well, I've taken the long way around to my point: I ask you to reconsider your public rejection (AAS 6/3/93) of my idea for USF&W to accept responsibility for managing the habitat preserves established under the Endangered Species Act. I suggested this idea several months ago, and just this week I asked Paul to set up a meeting so we could discuss this idea since SB 880 died. We count on you to do the impossible in Washington, because you've done it before. I need your help, advice, and advocacy for this idea.

I propose that we simplify a model for habitat conservation. I propose that private and public resources from Travis County be used to purchase biologically sufficient habitat land to earn a Section 10a permit for the entire county and that these preserve lands be turned over to USF&W for eternal management.

USF&W is already managing the beginnings of the preserve in the Post Oak Ridge area, thanks to your good work. Surely, there are economies of scale and scientific lessons to be achieved by having one management of our "local" preserve as well. You may find it to be a glorious national model for the Federal government to say: "If communities will make habitat land available in sufficient quantity, we'll take responsibility for properly managing those preserves with Federal resources so we can reconcile conflicts with the Endangered Species Act in your community."

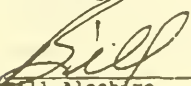
Is it really better Federal policy and is it really going to cost the Federal government less to pay for raw enforcement of the Act in a community than to pay for the cost of managing the preserves?

Jake, at least do me this favor. Please ask USF&W what they think it would cost them to manage our preserves well.

We're all looking for alternatives to failure and this idea might be one of the best alternatives left. I'm sorry SB 880 went "foul", but we damned near worked a political miracle with that bill, and I'm not completely giving up hope for another turn at bat. However, I don't apologize to anyone for the standards I've tried to achieve for the BCCP or for the level of effort I've put into this issue.

I don't even apologize for a bit of fanciful thinking.

Sincerely,



Bill Aleshire

cc: County Commissioners

TEXAS ENVIRONMENTAL PARTNERS

8140 BURNET ROAD • P.O. Box 9589 • AUSTIN, TEXAS • 78766 • (512) 452-9383

PROPOSED "PRIVATIZED" ALTERNATIVE

This information has been drafted to assist the environmental impact analysis of the Balcones Canyonlands Conservation Plan (BCCP) which is being conducted by Regional Environmental Consultants, Inc. (RECON) of San Diego, California.

In providing this requested information, references are made to key Sections of the BCCP's Phase I Application Document dated February 1993. For this Phase of the Federal Environmental Impact Statement (EIS) review process, only the first 9 Sections of the total Document have been submitted to date for review by governmental preparers. The remaining Sections of the 17 Section Document are to be submitted in coming weeks. Further detail concerning the proposed "privatized" alternative will be transmitted to RECON as additional Sections of the Application Document are made available. Graphic exhibits and other items of information, relevant to the biological consequences of the alternatives proposed below, are being completed and they will be forwarded to RECON as rapidly as possible to meet timeline priorities.

5.0 ALTERNATIVES CONSIDERED

5.1.2 THE "PRIVATIZED" ALTERNATIVE

The chief distinction of the system, termed the "privatized" alternative, is that it relies primarily upon the good will and resourcefulness of landowners, private citizens and their enterprises to accomplish the missions mandated by the Federal Endangered Species Act (ESA).

If applied to the proposed BCCP, this system should demonstrate its merit and substantially increase the effectiveness and lower the cost of its regional Habitat Conservation Plan (HCP). Implementation will necessitate only a few modifications of provisions of the BCCP's 10(a) permit Application Document, which presents the proposal referred to as the "recommended plan."

In all instances, the privatized features proposed are designed to strengthen the quality of the proposed RHP.

The "privatized" alternative will expand the RHP's conservation area, enlarge the preserve system by 15%, strengthen its ecological quality, increase landowner participation and cooperative interaction with scientific specialists, upgrade RHP management and lower preserve acquisition and operational costs.

The proposed privatizations also introduce provisions which will, from its outset, enable the BCCP to be more than an endangered species RHP. A primary objective of those who propose the "privatized" alternative is to accelerate complete achievement of the BCCP's comprehensive original objectives.

It is also expected that the privatized BCCP will attract more broad-based and equitable funding than is projected in drafts of the currently "recommended plan." (That plan, which would be governmentally managed, proposes millions of dollars of new public debt and collection of a variety of new fees and surcharges that severely diminish the resources available to meet the region's growing list of unmet needs.) Private sector leaders have said that, if allowed to do so, they can produce strategies for resolving endangered species and resource management issues more effectively and by means that require little, if any, new public debt.

.

If the "privatized alternative" is selected, the BCCP will become a comprehensive multiphased regional resource planning system.

During its initial phase of operation, the privatized BCCP will implement the proposed regional Habitat Conservation Plan (HCP) and conduct a number of auxiliary projects designed to further increase endangered species protection. Such projects will increase landowner support and community participation and boost park expansion, water quality, conservation research and environmental education. In the course of this work, interest in action to improve the human habitat surrounding the HCP preserves will be revived and steps will be taken to hasten improvement of the region's total environment and economic resources.

The operations of the proposed privatized BCCP will be directed by a nonprofit public service foundation, the Balcones Canyonlands Foundation. (If the "recommended plan" alternative is adopted, the BCCP will be managed by a governmental Coordinating Committee controlled by elected officials and its activities will be primarily conducted by agency employees.) -

The Board of Trustees of the proposed Balcones Canyonlands Foundation will include landowners, business leaders and individuals associated with environmental organizations, educational and research institutions and government. This diverse Board will involve Trustees who reside in Central Texas as well as other regions of the State, Mexico and Central America.

The Foundation and its Trustees will be assisted by strong advisory teams. One such team, the Landowner and Scientific Advisory Team, will enable landowners and technical specialists to combine their knowledge when developing solutions to key problems. Other teams will focus on preserve management, education and research project issues.

A variety of strategies and compensatory measures will be utilized to accomplish objectives of the privatized BCCP. Many will rely on projects managed by "Conservation Stewards." These stewardship projects will be operated in compliance with all applicable laws and regulations. Training and certification will be required and organizations having experience with such programs will be requested to assist. Such organizations include the U.S. Fish & Wildlife Service, Mexico's Pronatura, The Audubon Society, Texas Parks & Wildlife Department, The Nature Conservancy as well as local managers of the Wild Basin Preserve and The Good Day Ranch.

It is forecast that many of the Conservation Stewards will own or will have owned the property placed in their stewardship. Businesses offering relevant services may also become certified as may development companies, educational and research groups, governmental agencies and interested individuals.

A Conservation Steward may volunteer to help manage preserve land or one of the numerous "Auxiliary Research Sites" that will be located outside the perimeters of the primary preserve units. These auxiliary sites will be established throughout the range and will encompass widely varying amounts of acreage, ranging from small patches of habitat to large areas where experimental practices which may aid species recovery are being studied. Cowbird trapping research will be expanded in these areas, enlarging upon promising projects pioneered at Ft. Hood by John Cornelius. New agribusinesses, which aid species protection and recovery, will be demonstrated on a variety of sites in the Conservation Area and elsewhere within the range of threatened or endangered species. More "children's forests," such as those sponsored by the Children's Alliance for the Protection of the Environment, will be established.

These "close care" systems will have a variety of measurable beneficial biological impacts. This approach is intended to be responsive to a key recommendation contained in the Biological Assessment of the BCCP prepared by the Resource Protection Division of the Texas Parks & Wildlife Department. It cautioned, given the projected increased urbanization of the region, that "intensive management" will be vital if the BCCP is to be reasonably successful. If the "privatized" alternative is chosen, its processes will provide such management, strengthen preserve quality and add "edge" protection. It is also likely that the versatile and cost-effective format of the "privatized" alternative will prevent some habitat fragmentation; developers who might otherwise favor the "no plan" alternative may determine the "privatized" approach is more appealing. (Most respondents to a survey of Travis County landowners having property in the area most impacted by current endangered species requirements preferred an alternative public/private approach similar to the "privatized" alternative. Five different permitting methods were considered and the "recommended plan" was not ranked among the top three choices. Completed in March 1993, the Survey was conducted for the Travis County Commissioner's Court by Texas A&M University and the Travis County Extension Service.)

The privatization proposed is not intended to inhibit the performance of any mission delegated exclusively to government. Related governmental expense and agency staffing patterns will be altered. However, government's capability to accomplish essential regulatory duties and to provide public service should be improved.

The goal of the "privatized" alternative is to open up new opportunities for the public and private sectors to team up to do what each does best.

Further information about the privatizations proposed is to be detailed in Items included in Section 10, which concerns Preserve Management and Research, and in Section 13, which outlines the BCCP's proposed Institutional Arrangements.

INSTITUTIONAL ARRANGEMENTS

5.3.2 ONGOING CONSERVATION PLANNING/COORDINATING AGENCY

5.3.2.1 ALTERNATIVE 1: NONPROFIT CORPORATION

Proponents of the "privatized" alternative, outlined in Section 5.1.2, believe a nonprofit organization can be structured to overcome the potential deficiencies asserted in the "recommended plan" analysis.

Furthermore, they believe the proposed Balcones Canyonlands Foundation is especially well-suited to accomplish the tasks expected of the BCCP's "Plan Operator." It will also be competent to serve as the BCCP's 10(a) permit holder.

No perfect institutional arrangement has yet been devised which provides ideal means for encouraging the swift multijurisdictional action complex ecosystemic priorities often deserve.

However, the Foundation's advocates regard the institution to be more capable of effective response to such priorities than the governmental Coordinating Committee suggested in the "recommended plan" Document. (An official Coordinating Committee would have a significant role if the "privatized" alternative is implemented, as shown on the Alternative BCCP Organizational Structure exhibit, but its members would focus on management of relevant governmental responsibilities.)

The new Foundation is designed to concentrate on permit compliance obligations. It has also been adapted to assist the development of useful cooperative programs involving people and jurisdictional officials throughout the range of the species of concern.

In its HCP activities, the Foundation will be responsible to the U.S. Fish & Wildlife Service for compliance with the terms of the BCCP's Section 10(a) permit. To fulfill such responsibilities, the Foundation will provide contract services for the various entities benefited by the permit. For example, governmental entities so benefited electing to participate will contract with the Foundation to obtain specified services and contract to commit appropriate funds and/or property. Other landowners benefited are expected to also contract with the Foundation and make similar commitments. These contractual arrangements will be executed in a manner that will assure the U.S. Fish & Wildlife Service that sufficiently reliable provisions have been made to warrant Permit approval.

The Funding Plan proposed for the "privatized" alternative will not require the proposed Foundation to levy any mandatory fees, surcharges, assessments or taxes. It is projected that the funding and property commitments incorporated in provisions of its contracts with participating entities will meet the Foundation's basic requirements. It is also anticipated that a broad range of funding sources will be available to the proposed nonprofit Foundation. (Its business plan is regarded to be more diversified than the one proposed for the "recommended plan" and more likely to attract substantial grant and supplemental contract assistance.)

In summary, the Foundation's services are expected to be more comprehensive, more accessible, more cost-effective and more likely to earn essential long-term community support than those of the governmental Coordinating Committee outlined in the "recommended plan." (Management of regional planning ventures attempted here in the past has been entrusted to governmental agencies primarily. The outcomes have been disappointingly ineffective and costly.)

Today, privatized services are being utilized increasingly to accomplish tasks previously delegated to government. Locally, private companies provide security for municipal buildings, maintain parks, preserves and cemeteries and assist many other governmental functions. In California, a private nonprofit organization (The Nature Conservancy) was designated to implement the Coachella Valley Habitat Conservation Plan's preserve acquisition and preserve operations activities. The organization also has a substantial role in preserve monitoring and fee administration and it has contributed millions of dollars to aid the Plan.

Additional details are to be included with data in Section 13, which focuses on the BCCP's Institutional Arrangements, and Section 14, which concerns Funding Requirements and Cost Allocations.

PRESERVE SYSTEM

8.0 PRESERVE SYSTEM OF THE PRIVATIZED HABITAT CONSERVATION PLAN (HCP)

The "privatized" alternative's HCP has been designed to add features which will substantially improve the quality and lower the cost of the preserve system referred to as the "recommended plan" in the BCCP's permit Application Document.

None of the privatizations proposed are expected to diminish the beneficial elements of that plan.

To produce improvement, the "privatized" alternative relies primarily upon the wisdom and cooperation of the region's landowners and other resourceful individuals.

The privatized preserve system proposed will be finalized and implemented chiefly under their management. Government will be asked to assist and will chiefly provide required regulatory services. (Under provisions of the "recommended plan," government would continue to determine all of the BCCP's planning, management and regulatory requirements.)

When preparing the design for the proposed privatized preserve system, work was focused to achieve significant upgrades of the most vital elements of the "recommended plan."

The preserve system proposed for the "recommended plan" has been characterized, by supportive biologists, as minimally adequate.

To explain acceptance of such marginal performance, the BCCP's Section 10(a) permit Application Document states the "proposed preserve system does not fully meet either the biological or socioeconomic criteria established earlier in the process" and reports the "recommended preserve system is a product of...compromises intended to provide the maximum protection of the species of concern within recognizable financial limitations."

As a consequence of such compromises, the "recommended plan's" HCP proposes to accomplish all essential protection within the boundaries of preserves which cover less than 10% of a narrowly defined Conservation Area located in the western quadrant of rapidly urbanizing Travis County.

Representatives of the National Audubon Society, the Travis Audubon Society and the Austin Sierra Club, who served on the BCCP's Executive Committee, have expressed concerns about critical elements of that plan. They have estimated that the proposed plan "would allow destruction of 80% of the higher quality karst habitat and approximately 71% of the potential Golden-cheeked Warbler (GCW) habitat; even in large patches of GCW habitat over 200 acres, over 50% of the habitat patches are not slated for preservation." When comparing the proposal's impacts with those achieved by the San Bruno HCP, which they regarded to be an accepted model, they reported the San Bruno Plan provided protection for 87% of habitat.

It has also been noted that the "recommended plan" makes no substantive commitment to projects which will encourage voluntary species protection and habitat restoration beyond the perimeters of preserves or which will foster cooperative ventures with people in adjoining counties and elsewhere in the range of the species involved.

The proposed "privatized" BCCP is designed to increase regional endangered species protection and to boost economic revitalization by the following measures:

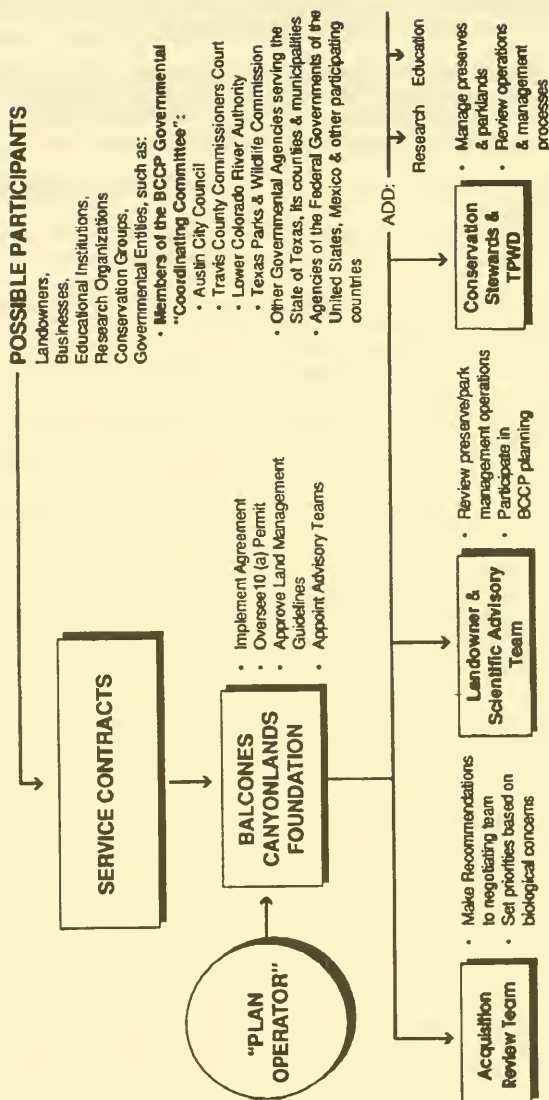
1. The Conservation Area will be expanded to benefit a region which includes all quadrants of Travis County, Austin's ETJ and the Balcones Canyonlands National Wildlife Refuge.
2. All endangered species habitat in the expanded Conservation Area will be:
 - a. Protected in a preserve, or
 - b. Located within an Auxiliary Research Site, where voluntary action to minimize habitat destruction and hasten species recovery will be encouraged.
3. The acreage protected by preserves will be increased by 15%. (The privatized HCP will provide a preserve system which includes a minimum of 33,559 acres that will be assembled within approximately 45,600 acres suitable for consideration as preserve sites. Take ratio standards meet or exceed those proposed for the "recommended plan.")
4. New primary preserve units will be added in the Lake Travis and Devil's Hollow Macrosites to improve linkages of top priority units with the Balcones Canyonlands National Wildlife Refuge.
5. Another primary preserve unit will be added in the Pedernales River Macrosite, which includes the only undisturbed riverine habitat in the Conservation Area.
6. Much of the privatized preserve system overlaps preserve sites proposed in the "recommended plan" and shown on Figure 8-1A of the BCCP's permit Application Document. However, the privatized system has been reconfigured in some instances to follow natural features of the Conservation Area's terrain instead of property lines. Such reconfigurations, which are conservation science based, will facilitate well justified steps to improve both human and non-human habitat.
7. The "close care" management systems, described in Section 5.1.2, will be utilized to intensify species protection. These systems, which will be operated by a nonprofit foundation (the Balcones Canyonlands Foundation), will involve landowners and other area residents in preserve and Auxiliary Research Site management through the new Conservation Stewards program.
8. To boost landowner participation, important new incentives will be introduced. Such measures will be considerate of the rights of landowners and fair to the region's other inhabitants.
9. Cowbird trapping research projects will be increased, especially in areas outside preserve unit boundaries.
10. With the assistance of cooperative landowners, the nucleus of a biodiverse species protection system will be created around water courses within watershed where endangered species have been reported or where environmental conditions meet potential habitat criteria established by the U.S. Fish and Wildlife Service. (Such action reinforces existing measures for protecting the region's water resources, which are essential for both human and non-human species preservation. The importance of such protection is widely accepted by landowners and development of such areas is subject to regulation in Austin's ETJ.)

11. A more definitive plan for regional park expansion will be proposed. This proposal will clarify arrangements for recreational usage in preserve system units.

12. Since the uncommon physical and cultural confluences occurring in Central Texas establish the region as one of the finest in the world for studies of the impact of urbanization on human and non-human habitat, the privatized BCCP will adapt its HCP, preserve unit system and auxiliary research site projects to contribute to such studies and to benefit from them.

Further detail on each of these features will be provided as additional Sections of the BCCP are submitted for EIS review.

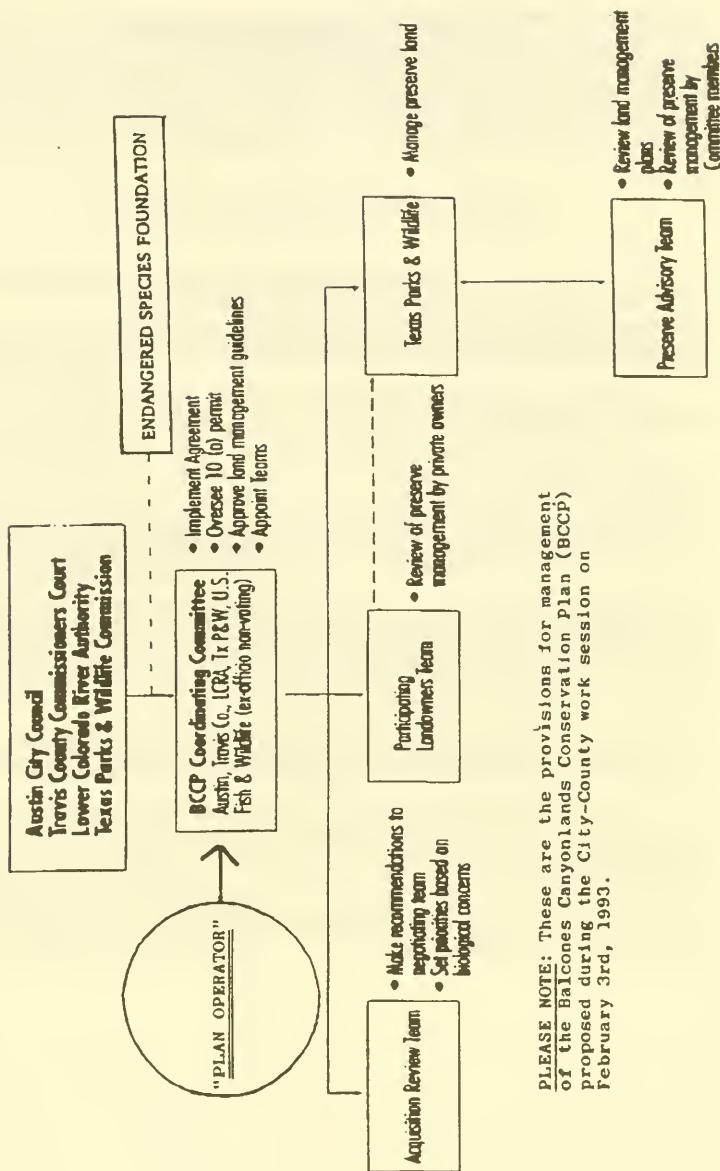
BCCP Organizational Structure



PLEASE NOTE:

This outline has been prepared to assist general components of the "Plan Operator" feature of the present version of the proposed BCCP (which specifies a committee, directed by four governmental entities) with the privatized organizational alternative depicted above.

BCCP Organizational Structure



PLEASE NOTE: These are the provisions for management of the Balcones Canyonlands Conservation Plan (BCCP) proposed during the City-County work session on February 3rd, 1993.

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"PRIVATIZED" HABITAT CONSERVATION PLAN (HCP)

If the proposed "privatized" BCCP alternative is selected, its Habitat Conservation Plan (HCP) will be based entirely upon the latest conservation science information available.

Provisions of the privatized HCP will not be compromised by theoretical socioeconomic limitations. Such predetermined restrictions unwisely influence priorities.

In practice, when conservation science is applied effectively, human and non-human habitat is protected and endangered species and the economy of the community prosper together.

To ensure relevant conservation science is applied effectively in the Conservation Area proposed for the privatized HCP, an uncommonly comprehensive regional resource planning system will be utilized.

This system will rely upon respected ecological planning processes reinforced by the knowledge of the many landowners, scientists and caring people throughout the region who will be actively involved in management of the HCP's preserves, auxiliary research sites and Conservation Steward activities.

During its preparation, everyone involved in designing the privatized HCP has been benefited by the accomplishments of the Biological Advisory Team (BAT) which helped formulate the scientific priorities outlined in the HCP outlined in the BCCP's Section 10(a) permit Application Document. They have also been benefited by professional contributions of the BCCP's consultant team, members of its Executive Committee and the interagency team which produced the Application Document now undergoing federal Environmental Impact Statement (EIS) analysis.

The concerns expressed in comments of BCCP Executive Committee participants, regarding the February 1992 Final Draft (published in October 1992 as Exhibit A of the pre-Application Draft) were especially useful as the distinguishing features of the privatized HCP were being developed.

The biological assessment of the BCCP, conducted by the Resource Protection Division of the Texas Parks and Wildlife Department, and the biological review of the BCCP, provided by staff of the U.S. Fish and Wildlife Service on July 22nd, 1992, also helped orient the biological course of the proposed privatized HCP.

That course was influenced as well by ideas incorporated in the biological assessment of portions of the BAT report, commissioned by the National Wilderness Institute and presented by the Texas Alliance for Property Rights on June 4th, 1992.

Progress of the "Plan-It Texas" project encouraged planners of the privatized HCP to propose a multipurpose system which relies primarily upon cooperative action by landowners and conservation scientists to accelerate habitat protection, restoration and research. (Initiated by Holistic Management of Texas, Plan-It Texas is a partnership which involves members of the Texas Sheep and Goat Raisers Association, the Texas & Southwestern Cattle Raisers Association, the Riverside and Landowners Protection Coalition, the Texas Wildlife Association, the Audubon Society and the Texas Nature Conservancy and staff of the U.S. Fish and Wildlife Service and the Texas Parks and Wildlife Department.)

• • • • •

THE PRIVATIZED HCP

1. The privatized HCP is designed to reinforce the HCP described in the BCCP's Section 10(a) permit Application Document and to provide a more adequate level of protection for habitat of the species currently listed as endangered.
2. Its measures will also strengthen the region's capacity to respond to future requirements by steps which protect water resources and other ecological elements essential for biodiverse problem-solving.
3. It has been estimated that as much as 90% of the acreage needed to establish the privatized HCP's system of preserves is located where development is restricted today or where the terrain is steep and generally regarded by landowners to have minimal value. Analysis also supports the probability that equitable arrangements can be made which enable every landowner to benefit from establishment of the proposed preserve system.
4. Management of the privatized HCP will be entrusted to a nonprofit public service foundation (the Balcones Canyonlands Foundation) which will focus undivided attention on Section 10(a) permit responsibilities and boost cooperative actions, within the Conservation Area and throughout the range of the species of concern, which increase the scope and certainty of habitat protection.
5. Recognizing that the Balcones Canyonlands Conservation plan (BCCP) is initially dependent upon complex projections based on relatively new data and limited ground truthing, the privatized HCP will establish an extensive research network to speed-up improvement of relevant conservation science.
6. The preserve design priorities outlined on page 8-3 of the BCCP's Section 10(a) permit Application Document have also been utilized in planning the preserve units proposed for the privatized HCP. (These priorities require the preserve system to "encompass a minimum of 29,159 acres" and "include as much acreage as possible within the three core preserve units which are considered essential to the success of the BCCP: Cypress Creek, Bull Creek, and North Lake Austin. Two other preserve units, the South Austin, and Barton Creek preserve units, are also recommended as part of the BCCP system, however are not considered as great a priority for the protection of warbler and vireo populations in the BCCP Conservation Area.")

7. The features of the proposed privatized BCCP are also designed to achieve all improvements recommended by staff of the U.S. Fish and Wildlife Service on July 22nd, 1992. (The improvements recommended, following review of the biological basis of the BCCP, are summarized on pages 16 and 17 of their response to an inquiry initiated by the Director of the Resource Protection Division of the Texas Parks and Wildlife Department.)

8. Through programs guided by participating landowners and aided by conservation scientists and officials of the U.S. Fish and Wildlife Service, the privatized HCP will increase the size of the preserve system by 15% and establish preserves and auxiliary research sites in macrosites that will be unprotected if the plan currently recommended is adopted.

9. The privatized HCP will introduce primary preserve units and auxiliary research sites in the Lake Travis and Devil's Hollow macrosites. These steps will improve the system's protective capacity by strengthening linkages between preserve units in priority macrosites (North Lake Austin, Bull Creek and Cypress Creek macrosites) and the Balcones Canyonlands National Wildlife Refuge.

10. A primary preserve unit and auxiliary research sites will also be established with the assistance of participating landowners in the Pedernales River macrosite. This site, according to a statement in the BCCP's Section 10(a) permit Application Document, includes "the only undisturbed riverine habitat in the BCCP conservation area."

11. Additional preserves and auxiliary research sites will be created in the Southwest Austin macrosite and elsewhere in the Conservation Area to boost habitat protection beyond the perimeters of primary preserve units.

12. The privatized HCP's preserve system generally incorporates preserve sites recommended in the BCCP's February 1992 draft, although some ecologically justified reconfigurations are expected in the finalization process.

13. All readily identifiable occupied or potential habitat or management areas will be protected in a preserve or located within an Auxiliary Research Site (where voluntary action to limit habitat destruction will be encouraged.)

14. Brown-head Cowbird trapping, which is presently concentrated closeby the nesting habitat of vireos and warblers, will be expanded significantly and conducted elsewhere in the Conservation Area under provisions of the privatized HCP. This program will help protect vireo and warbler habitat and reduce agricultural damage during the seeding season.

15. It is expected that landowners having property committed to preserves and related projects and others living nearby sites in the Conservation Area will, with the assistance of the U.S. Fish and Wildlife Service and the Texas Parks and Wildlife Department, combine to give the preserve system the close long-term care required to sustain its biological quality in the rapidly urbanizing region.

16. Summary: The privatized HCP will establish a high-quality preserve system and create a supportive regional research network designed to maximize endangered species protection and economic progress.

To accomplish these objectives, the HCP will apply accepted conservation science principles and entrust the area's landowners, natural scientists and other resourceful people to guide its operations effectively and fairly.

The preserve system will include a minimum of 33,559 acres centered around seven primary preserve units and two secondary preserve units.

These preserves (and auxiliary research sites) were planned after analyzing information available regarding potential habitat and after studying composites, prepared by Cunningham and Allen, Inc., of warbler and vireo sightings reported to the U.S. Fish and Wildlife Service.

The additional preserves proposed will be located in the following macrosites:

	<u>Minimum Size</u>
Cypress Creek Macrosite	550 acres
Devil's Hollow Macrosite	500 acres
Lake Travis Macrosite	3,400 acres
Pedernales River Macrosite	500 acres

When assembling preserves, landowners will be invited to meet with conservation scientists who will furnish information about the privatized Habitat Conservation Plan (HCP) and the Conservation Stewards program. Cowbird trapping and other agribusiness opportunities will be described.

During these typically private meetings, landowners, developers and their representatives will be asked to help set up and manage the preserves and auxiliary research projects planned. These landowners will also be asked to suggest how they prefer such programs to be implemented. A variety of compensatory arrangements and incentive features will be discussed.

The decision to take part in any of the projects proposed for the privatized HCP will be a voluntary choice.

Localities regarded to be suitable for new preserves and auxiliary research projects are identified on Figure I-3.

Additional detail will be provided as the privatized RHP is finalized.

If the proposed privatized HCP earns U.S. Fish and Wildlife Service approval, the Balcones Canyonlands Foundation (BCF) will provide all preserve site, management and funding documentation required to implement the HCP.

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"I heartily accept the motto, that government is best which governs least."

Henry David Thoreau (1849)

INVITATION

Landowners, the scientific community and resourceful individuals now have a good opportunity to show what they can do to help resolve one of the most important issues this region, and the nation as a whole, faces today.

It has often been said that, if permitted an opportunity to do so, the private sector will contribute new ideas and new means for improving the quality and lowering the cost of projects designed to protect and restore the natural environment.

Currently, national attention is focused on Central Texan's attempt to produce a plan that will enable the region's endangered species and economy to prosper together.

The plan may become a model that will guide future decision-making and, in a significant manner, illustrate how its supporters believe this country's land, natural resources and endangered species programs should be managed in the years ahead.

Interior Secretary Babbitt, during his recent visit to Austin, said the proposed Balcones Canyonlands Conservation Plan (BCCP) has the potential to become a forerunner of the new ecosystem-based approach he has advocated to prevent bitter conflicts often characterizing application of the existing Federal Endangered Species Act (ESA). "You're at the 10-yard line," he commented. "You're going to create a national model if you can take that ball and get it across the goal."

In the form proposed, the BCCP will assure governmental control of the prospective model's planning, management and regulatory activities. That plan is recommended by the Austin City Council, the Travis County Commissioner's Court and the Board of Directors of the Lower Colorado River Authority. It is referred to as "the recommended plan" in documentation submitted to the U.S. Fish and Wildlife Service and the proposal is currently undergoing an Environmental Impact Statement (EIS) review conducted by Regional Environmental Consultants, Inc. (RECON) of San Diego, California.

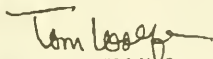
However, officials of the U.S. Fish and Wildlife Service and the City of Austin have invited Texas Environmental Partners to introduce an alternative plan for consideration. It will be regarded as the primary alternative to the "recommended plan" and it will be given formal evaluation and presented during upcoming public hearings in the course of the ongoing Federal EIS process.

We have accepted the invitation and drafted a description of an alternative we refer to as the "privatized" alternative. To produce the substantial benefits outlined, its systems rely primarily upon the wisdom and cooperation of the region's landowners, conservation scientists and many other caring people. The BCCP, under the provisions of this alternative, will be finalized and implemented under their management. (Government will be asked to assist and, where necessary, provide regulatory services.)

Our alternative proposal is an independent product of two year's study, analysis of the proceedings of more than fifty public meetings and consideration of ideas gathered from hundreds of individuals in Texas and in Mexico.

If you are interested in the issue involved, we would like to have your views regarding our alternative proposal and your assistance with its presentation if you believe it has merit.

Our resources are limited presently and we have little time to work with but we intend to make a full-fledged presentation of measures that will boost the quality of the BCCP, lower its cost, and speed-up its approval in a form that earns respect.



Thomas H. "Tom" Wolfe Sr.
Projects Manager
Texas Environmental Partners

6/1/93

Austin ecological effort praised

By Ralph K.M. Haurwitz

American-Statesman Staff 2-14-93

Interior Secretary Bruce Babbitt donned hiking boots, a gray sweatshirt and a field coat for a hike in the Hill Country around Austin on Saturday.

He saw thick stands of Ashe juniper, commonly known as cedar, where an endangered songbird known as the golden-cheeked warbler lives. He saw pristine streams, bunches of prickly pear and mounds of fire ants, those pests that are increasingly the scourge of much of the South.

But most of all, Babbitt, a former Arizona governor and one-time candidate for the Democratic nomination for president, saw what he described as the best example in the nation of a new and broader approach to endangered-species protection.

Meeting with environmental, business and political leaders at the Wild Basin Preserve Lodge, Babbitt urged continuation of local efforts to assemble a system of nature preserves under the Balcones Canyonlands Conservation Plan. The plan seeks to set aside habitat for the warbler, the black-capped vireo and several species of cave invertebrates, as well as protect ground water, streams and the magnificent views of the Hill Country.

The effort by public and private organizations exemplifies the multispecies, ecosystem approach to habitat protection that Babbitt has deemed his top priority as the nation's chief steward of public lands, wildlife, fish and other natural resources.

"You're at the 10-yard line. You're going to create a national model if you can take that ball and get it across the goal," Babbitt said.

He stopped short, however, of offering any new federal funds for land acquisition, noting that this is a season of budget-cutting. He promised, however, to look into the possibility of advancing funds for "dedicated acquisition, with the money we paid back by local bond issues.

During an interview, the interior secretary said his other top priorities would be to secure more funding for national parks and wildlife refuges and to end bargain-basement prices for logging, hard-rock mining, grazing and other uses of public lands. He said he would prune some programs, such as dam-building in the West.

Babbitt is widely respected among environmentalists and got a warm reception here from environmentalists and business leaders alike. He was president of the League of Conservation Voters, the political arm of the environmental movement, during the Bush administration.

Under the concept championed by Babbitt and taking shape here, the best features of an ecosystem are preserved, while less important portions are developed.

This means, Babbitt acknowledged, that some endangered birds and other wildlife will die. But survival of species is ensured.

The tract-by-tract, critter-by-critter approach used under 12 years of Republican administrations does not allow for this flexibility and instead produces a last-minute crisis that winds up in court, he said. As a result, the act has earned a reputation as an insurmountable obstacle among many landowners and developers.

A successful resolution of the Balcones project could help shore up the act politically, Babbitt said.

The law comes up for reauthorization later this year. Although a coalition of development interests known as the "wise-use movement" is seeking radical changes, Babbitt expressed doubt Congress would weaken the law.

A far better example of corporate responsibility, in his view, is the 3M. Babbitt presented a corporate wildlife stewardship award to 3M.

The company destroyed 12 acres of golden-cheeked warbler habitat for the sleek new complex. But it acquired 215 acres of habitat for the Balcones project, replanted 40 acres of the 215-acre tract and placed \$60,000 in escrow to fund management of the parcel.



Staff photo by Ralph San

Interior Secretary Bruce Babbitt examines wildlife on nature preserve in Hill Country after a meeting on endangered-species protection with local leaders.

Babbitt to Map Ecosystems Under Policy Shift

By WILLIAM K. STEVENS

Interior Secretary Bruce Babbitt has taken the first steps in a major policy shift intended to head off conflict over the Endangered Species Act by focusing on the preventive, long-term care of entire ecosystems.

Two of the nation's best-known conservation biologists, Dr. Thomas E. Lovejoy of the Smithsonian Institution and Dr. Peter H. Raven of the Missouri Botanical Garden in St. Louis, have been recruited to help set up a national multidisciplinary survey to map the country's ecosystems and biological diversity, much as the United States Geological Survey maps its geology and geography.

The mapping will be undertaken as a reorganization of the Interior Department's biological research, which is now divided among several agencies. Mr. Babbitt is asking Clinton Administration budget officials and Congress to approve the transfer of \$12 million from elsewhere in the Interior budget to bolster the consolidation effort in the fiscal year that begins Oct. 1. Interior officials said they expected the request to be approved.

A biological survey is critical to any effort to practice preventive medicine in ecosystems, Mr. Babbitt said in an interview Thursday. With an accurate map of the country's biological diversity, he said, "we can spot the problems coming while there's still flexibility and time to deal with them," before they result in a collision of economic and environmental interests.

Without such information, the Secretary said, "you don't have a chance."

'A Historical Moment'

Dr. Lovejoy is to be detached from the Smithsonian for four months, beginning about April 1 to advise in planning the survey, Mr. Babbitt said.

Constance Newhall, Under Secretary of the Smithsonian, said this "we're very excited" about the position's role in the survey and that the Smithsonian had "every intention of continuing" its involvement after Dr. Lovejoy's tenure.

Raven will head a National Academy of Sciences committee that will offer advice on organizing the survey.

Mr. Babbitt said. His report is to be issued in September.

"This is truly a historical moment," Dr. Raven said. "It's similar in when the U.S. Geological Survey was initiated over a century ago."

The geological survey, now one of the nation's major research organizations with a far-flung network of nearly 5,000 employees, grew out of a similar collaboration among the Interior Department, the Smithsonian and the National Academy of Sciences in 1879. Mr. Babbitt cited this "echoing of history" with enthusiasm, but at its start the biological survey will be much more modest than the present-day geological survey. Like the geological survey, the biological survey will be a continuing one.

Evolving Picture of U.S.

Mr. Babbitt said that the nucleus of the biological survey would be the existing research establishment of the Fish and Wildlife Service, an Interior Department agency, and that other department research efforts on biological diversity would be consolidated with it. The survey will also seek the cooperation of state agencies and Federal ones outside the Interior Department, like the Forest Service.

The survey's goal, Mr. Babbitt said, is to produce a constantly evolving, computerized picture of the nation's biological diversity that "adjusts to changes in land use, to ecological changes, and which must with the passage of time become more sophisticated" and more detailed as knowledge of species and ecosystems grows.

He said compiling that picture was the only way to know where the ecosystems of maximum biological diversity were, which were the most fragile and which had the best regenerative powers. In this way, Mr. Babbitt said, it may be possible to diagnose problems earlier and take action well before any plant or animal species becomes endangered.

Once a species is declared endangered under the Endangered Species Act, its habitat is designated as critical, and after that, the Secretary said, "you can't destroy one square inch of it."

legal process."

State and local governments and private conservation groups across the country are already devising ecosystem protection plans to avoid that kind of conflict.

First Step in California

Mr. Babbitt said he believed that the most interesting plan was one in Southern California in which state and local governments and private landowners joined to protect more than 200,000 acres of mostly dry shrub that biologists call the coastal sage scrub ecosystem. Through land acquisition, zoning and local land-use planning, the governments intend to protect a variety of fragile species that are not yet endangered.

Because the California plan offers assurance that the overall ecosystem will be protected, it is less important to protect every little piece of property. As a result, Mr. Babbitt said, the Fish and Wildlife Service was recently able to issue an opinion allowing developers to construct a freeway, thereby avoiding "what would have been a big crisis."

The existence of the ecosystem plan, the Secretary said, means "we can kind of pull back and watch how the process unfolds and not be as heavily-handed about intervention." And that, he added, is why landowners like it.

In addition, if all the known plant and animal species are included in an ecosystem management plan or recovery plan, Mr. Babbitt said, landowners who cooperate in the plan are spared the possibility of having to confront one future endangered species crisis after another.

Such crises are "always fought out on a case-by-case basis in a highly legalistic way," Dr. Raven said, "and the result is that we're not necessarily making the best decisions."

One reason for that, he said, is that



Interior Secretary Bruce Babbitt, who is trying to avoid conflict over the Endangered Species Act.

the United States has never had a comprehensive delineation of its plants, animals, fungi and microorganisms. With such a survey and the ecosystem approach it makes possible, "we can make decisions that will really serve our interests not only now but in the future," Dr. Raven said.

"Otherwise," he said, "we run the risk of picking ecosystems apart piece by piece, never getting the results we want."

The New York Times
3-14-93

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**We do whatever we can...
whenever we can...to
encourage cooperative
action that will speed up
environmental and
economic progress.**



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**Tom Wolfe, Projects Manager
FAX: (512) 454-4221**

Above all, we spend lots of time listening to lots of people, young, old and in-between, because they have much to say that's important to consider.

We work to improve circulation of their viewpoints.

We help them to get to know one another better.

We help them understand the issues and their consequences.

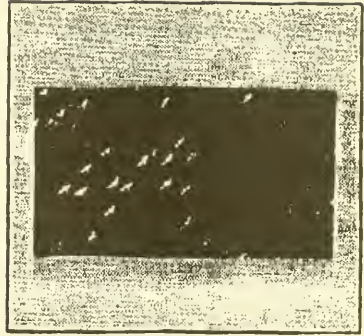
We work to encourage people to be active in the decision-making process.

We work to ensure that such processes are fair and open to all.

We work to enable people to have convenient access to reliable information.

And, we work to prevent attempts to manipulate people and the facts they rely upon.

**TEXAS
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We look for opportunities to boost the success of others.

We help strengthen connections between resourceful people and their enterprises.

When conflicts slow progress we offer, as non-partisans, to help resolve differences.

We also serve as a source for unbiased information and independent evaluations of promising new ideas, new technology and equipment, operating systems and current practices.

Progress Report

Following several months of consultation and study to determine objectives that might be worthwhile, we initiated our first projects in January 1991.

These activities have since assisted two environmental expos, jointly sponsored a much-needed seminar to help landowners understand the impacts of the Federal Endangered Species Act, boosted a student debate on complex water quality topics, and we have produced, in association with undergraduates from UT-Austin's School of Communication, a series of televised news events on significant conservation, parkland revitalization and economic development issues. We are also continuing an analysis of the proposed Balcones Canyonlands Conservation Plan, which is attracting national interest as a pioneering effort to produce a model regional resource planning system that enables endangered species and development to prosper together in urbanizing areas.

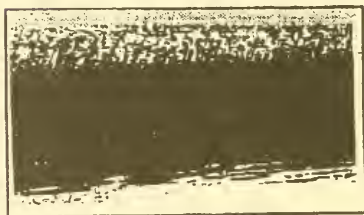
Throughout the course of our first phase of work, we have been benefited by hundreds of people in Texas and Mexico. They have shared their ideas with us, encouraged us and helped accelerate environmental and economic advancement in numerous ways not outlined here.

Established as a private, non-profit public service venture, we have adopted a cooperative project focus, as advocated by Tom Peters, noted management consultant and author, whose column, "On Excellence," is widely read and respected. Such a focus is expected to increase the speed, lower the cost, and strengthen the quality of results.

Our activities during our formative stage were exploratory in nature. We took time to learn if the theoretical ideas we began with, regarding potentially constructive services, would be affirmed through such experience.

We can now say we think we can make some worthwhile contributions and we plan increasingly substantive projects in the years ahead.

TEXAS Environmental PARTNERS



Invitation

We have previously deferred formal membership and development program activity because we wanted to first see how our concepts fared in real-world tests. All financial support has come from individual friends and family. Valuable scientific and technical assistance has been contributed by a number of caring experts.

Today, we invite you to join us as a Founding Partner.

There is much to do that will get done better with your help.

Founding Partner Memberships

Preschool to High School	\$1
High School to College	\$5
Senior Citizens	\$5
Other Individual Members	\$10
Business/Organization	\$25

Please Note:

Participation is not denied anyone unable to contribute the membership fee requested above.



We know many good people are already working to protect and improve the quality of life. We know also that many more would like to help if invited and shown how they could make a difference.

You are invited to take part in our cooperative ventures, even if your primary allegiance is to another organization or activity.

You will likely meet some people you'd like to get to know better. And, there are others you can encourage to achieve goals they would otherwise perhaps never reach.

TEXAS
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TESTIMONY
OF
THE TRANS TEXAS HERITAGE ASSOCIATION
REGARDING S. B. 880
BEFORE THE
SENATE NATURAL RESOURCES COMMITTEE

APRIL 19, 1993

My name is Topper Frank and I am from Van Horn, Texas. I appreciate the opportunity to testify today before this committee on behalf of the Trans Texas Heritage Association. I currently serve as President of the Trans Texas Heritage Association and represent its members who own more than 13 million acres of privately owned land in Texas.

I am here today in opposition to S.B. 880.

Although on its face S.B. 880 appears fairly straightforward, it encompasses enormous complexities, uncertainty and controversy. The Endangered Species Act of 1973 (ESA) is broken. Because of its almost total inflexibility, it is frequently called a "pit bull of a law" and has now created endless controversy in almost every state and region of the nation. I say the ESA is "broken" because its application as an almost limitless land use law is costing countless jobs and loss of property values and rights from Seattle to Miami. Worse yet, it is not accomplishing its goal of recovering species to the point they can be removed from the list. With over 700 species now listed as endangered or threatened, fewer than a dozen have been removed from the list as recovered. Those few species recovered on their own, not as a result of any governmental action. The ESA is due for re-authorization this year and almost certainly will be amended by Congress given the controversy surrounding it.

Under the ESA it is unlawful to kill or harm endangered species. The federal courts have defined "harm" to include the adverse modification of habitat upon which listed species depend.^{1/} In an effort to ease some of the burdens imposed on people and economies by the ESA, Congress amended it in 1982 to provide for Section 10(a) which permits the incidental "take" of listed species. The general theory behind the Section 10(a) process is that some members of a species can be lawfully "taken" by federal permit in exchange for money and property dedicated by the permittees to the U.S. Fish & Wildlife Service or state agencies. The basic vehicle to serve as a foundation for the issuance of 10(a) permits is the Habitat Conservation Plan (HCP).

This then is the basis for the bill you are considering today. Without discussing the many ramifications of ESA Sections 7 and 9 upon which Section 10(a) hinges, I will attempt to outline something of the history of failings of Habitat Conservation Plans around the nation and some of the reasons they have proved unworkable and impractical.^{2/}

The first HCP was established in Northern California and served as the Congressional model upon which the Section 10(a) amendment to the ESA was enacted. The San Bruno Mountain HCP was the result of a decade-long fight between a proposed development project and two species of butterflies. Like most HCPs, the San Bruno case primarily involved developers who could afford to dedicate a significant portion of the proposed development property to a butterfly preserve.^{3/} In addition, a commitment was made by the developers to fund conservation efforts for the butterflies by the imposition of development fees. This process, now incorporated into all HCPs, has become known as "greenmail". In other words, if a property owner desires to adversely modify the habitat on his own property, he is required to set aside other property in perpetuity for the preservation of the species. This is usually accomplished by conveying that property to

the federal government or a state agency. Typically, the amount of land required to be set aside exceeds the development property by a ratio of ten or twenty to one. In addition, the permittee is required to provide means of assurance of funding the preserve's needs. These fees frequently total in the millions and tens of millions of dollars.^{4/}

Even in California where the development community is accustomed to the highest development fees in the nation, strong resistance to IICP development fees is being met. Incidentally, these fees are passed on to the ultimate homebuyer whose costs are independently skyrocketing due to greatly increased lumber costs resulting from the impacts of the threatened northern spotted owl on the timber industry.^{4/}

Of the many HCP efforts that have been undertaken, only a few have even moderately succeeded. One of the problems increasingly encountered is the inability to take into consideration species which might be listed in the future. There is no incentive for developers to participate in the HCP process absent an assurance that they will be protected from prosecution of a "take" of a species. In some HCP efforts an agreement has been reached between the HCP participants and the USFWS that the "take" of future listed species will not result in prosecution. However, the courts are increasingly holding that a public agency may not contractually restrict its future exercise of authority.^{6/} The usefulness of the HCP process is greatly reduced or eliminated if the permittee cannot be assured he will not be subject to future criminal sanctions as additional species are listed.

Of the few HCPs which have reached a conclusion, all have required years to conclude. This seems to be a function of the number of participants and interest groups involved. A review of the many failed HCPs reveals that large numbers of participants almost predict a failed effort. As a result, individual landowners who are not members of the development community are likely to be omitted from the process. However, they are

directly affected by the outcome. As a practical matter, the sheer expense of participating in the HCP process eliminates all but the heavyweights, leaving the the small property owners at the mercy of those who can afford to participate.

Most of our members are owners of small properties. They are not developers nor do they have a realistic voice in a local bond election. Many own small farms and ranches where they have worked and lived a lifetime. They are the losers in the HCP process.

Aside from the many shortcomings of the HCP process, S.B. 880 is a bill designed to remedy the absence of legislative authority for mitigation fees and the absence of a regional planning agency with authority to implement an HCP. However, S.B. 880 may raise more questions than it answers. For example, the bill authorizes the regulation of conduct in the habitat preserves which is inconsistent with the preserve purposes. This provision leaves much to be interpreted. Also, Section 83.016 of the bill authorizes fees to be assessed against "any development". Our members wonder if an addition to an existing barn is "any development".

The bill is silent regarding the use of condemnation powers in connection with mitigation. Therefore, we must assume that governmental units involved with HCPs will not be limited in their use of eminent domain powers. Serious abuses of eminent domain powers in connection with mitigation have arisen in other jurisdictions. In one California case a flood control district condemned land more than one hundred miles away from the project in order to mitigate endangered species habitat at the projects location!7/

I have attempted to outline in very brief form some of the reasons this committee should not vote favorably on S.B. 880. A measure involving the complexities of HCPs

should be carefully studied before any action is taken on it. The Trans Texas Heritage Association will be pleased to provide additional information regarding Habitat Conservation Plans should this committee desire such information. I may be reached at (915) 837-3461.

Mr. Chairman and members of the committee, our members appreciate the opportunity to express our deep concerns about S.B. 880.

- 1/ Palila v. Hawaii Department of Land and Natural Resources, 471 F. Supp. 985 (D. HA 1979), aff'd 639 F. 2d 495, 9th Cir. 1981)
- 2/ Section 7 of the ESA prohibits a federal agency from authorizing, funding, or carrying out any action unless it can insure that the action (1) is not likely to jeopardize the continued existence of any listed species and (2) is not likely to result in the destruction or adverse modification of critical habitat. This provision triggers Section 7 formal consultations.
- 3/ See: Marsh & Thornton, *San Bruno Mountain Habitat Conservation Plan*, in *MANAGING LAND USE CONFLICTS*, 114 (C. Brower & D. Carol, eds.1987)
- 4/ 16 U.S.C.A. Section 1539(a)
- 5/ Habitat Conservation Conservation Plans, *ENVIRONMENTAL LAW REVIEW*, Northwestern School of Law of Lewis and Clark College, Vol. 21, No. 3, Part 1
- 6/ *ibid*
- 7/ Kenneth Mebane, Kern County, CA

June 17, 1993

Merchant Marine and Fisheries Subcommittee
On the Environment and Natural Resources
FAX 202-226-3540

Attention: Jane Ann Rex / Congressman Jack Fields et. al.

Re: Balcones Canyonlands Conservation Plan (BCCP)

Dear Committee Members:

I oppose the Plan referenced above and any other similar plan that is deemed necessary for preservation of endangered species. It is my belief that the enforcement capability of the federal bureaucracy has been exaggerated in an effort to achieve local funding for endangered species protection. It is my opinion that the BCCP should be termed a recovery plan for the feathered species of local concern, the vireo and warbler. The so-called Balcones Canyonlands Conservation Plan (BCCP) far exceeds any reasonable measures that might be considered necessary for a local "conservation plan" and, in fact, constitutes a "recovery plan" by requiring the creation of a viable population of these species where none now exists. That is, if you believe the incomplete biological work upon which the endangered listing was made. Which is, in my mind, a BIG IF. Biological research regarding these species has been very limited due to the shortage of funds at all levels of government. Area biologists have acknowledged that the satellite imaging work that was used to "list" these bird species is considered to be a very unreliable method for identifying occupied habitat and should not have been considered as sufficient evidence for the listing process. By federal law, recovery plans for at-risk species should be funded by the mandating agency after providing complete biological studies to demonstrate the necessity for said funding. Since this has not been provided it is my opinion that the local conservation planning effort is premature.

I believe that the driving force behind the plan is the Texas Nature Conservancy. This so-called non-profit group stands to benefit through their land flipping deals and will increase their revenues by millions of dollars. Their profit will be made at the expense of local and federal taxpayers, and cannot take place without this plan. This is because the RTC sale of 10,000 acres, that is a necessary part of the Plan has a contingency clause which links the sale to the success of the Balcones Canyonlands Conservation Plan. With the plan the RTC sale of 200 million dollars in central Texas real estate can be finalized to the Texas Nature Conservancy for 15 million dollars. The contingency clause in the sales contract requires the completion of the Plan for the purpose of releasing other RTC properties for development. I have never considered it wise to sell over 200 million dollars of property to the Texas Nature Conservancy for the 15 million dollars that was negotiated. I believe that this is a lunatic idea, considering our federal deficit and I will continue to oppose anything that furthers this deal.

Sincerely,

Kathryn Heidemann
Kathryn Heidemann
1002 Ash Street
Georgetown, Texas 78626
512/863-2935

February 11, 1992

County Judge Bill Aleshire
P.O. Box 1748
Austin, Texas 78767

473-9555
Dear Judge Aleshire:

Now 15 million

I still object to the proposed Balcones Canyonlands Conservation Plan (BCCP) and the related R.T.C. plan to sell 9,633 acres for endangered species habitat to Texas Nature Conservancy for ~~15.5~~ million dollars. Less than 1/3 of this property has been estimated to contain potential habitat for endangered species. This estimate has been based on satellite imaging that has not been proven to be an effective method for identifying occupied habitat. It is still unknown to me as to what portions of the R.T.C. property, as well as many private properties, may contain occupied habitat. The statement has been made that Travis County contains 50 percent of the existing habitat for the warbler. However, there has been no evidence presented to identify whether the habitat is classified as potential or occupied habitat. Even though enforcement strategies should differ in these two very divergent categories, the USFWS has not acted to designate critical habitat as they should. This should be done based upon species occupancy and economic impact. The fast approaching deadline for this designation under the warbler listing is May of 1992. I believe that it is ill-advised to make the decision to abandon valuable assets remaining in the R.T.C. land portfolio, based upon incomplete data and based upon incomplete due process. I am aware that the Pacific Legal Foundation is searching for a takings case in Travis Case. My concern is that the city and county appear to be on the road to accepting liability for any takings claims that may arise. I am convinced that there will be some because of the value of the land involved.

Even under diminished property values, this property is some of the most desirable hill country development property in our state. Improvement of this area is crucial to Austin's economy. There must be environmentally sensitive methods for development that will enable people to coexist with the natural environment. I consider your leadership in this direction to be essential to seeking an alternative plan to the present BCCP. I hope that you will research the possibility of expanding the Texas Private Lands Enhancement Program for private properties that are occupied by protected species. For federally controlled lands the designation of critical habitat should be utilized to determine those areas that can be released for environmentally sensitive development.

The BCCP is, as it presently exists, a funding mechanism proposed to replace federal enforcement activities that are under funded. The BCCP and the ESA are being utilized to delay development of private property to encourage passage of the local preservation plan. Another side effect of this plan is to switch

the burden of proof that a violation has occurred from the federal government, where it now rests, to a requirement that the landowner must prove his innocence. I believe that this contradicts every tenet of Texas and American law that exists.

The present BCCP scheme limits the take of potential bird habitat to periods when endangered songbirds are absent from the region. Without this plan, the ESA only restricts taking of warbler and vireo habitat during the spring and early summer when it is possible for private landowners to accidentally take a protected bird species during development clearing of occupied habitat. This plan extends habitat clearing restrictions to the remainder of the year over potential habitat whether it is occupied or not. Between August and February, development within identified preserve areas will be permitted only in exchange for habitat mitigation fees for the take of potential habitat as defined by USFWS. At least one fourth of the preserve areas identified do not contain occupied or potential habitat but landowners wishing to develop must so prove if they do not wish to pay the fee. This gimmick results in expenses for biological studies that can be cost prohibitive.

Additional funding mechanisms are planned for this conservation idea, in the form of a county tax increase (if a bond election passes), city revenue bonds, a utility service and/or water use fee and funding from local highway projects. These taxpayer derived fees will be combined with development mitigation fees for the total cost needed to purchase preserves for the plan. That total cost has been estimated anywhere from \$ 200 million to \$ 330 million over a thirty year period. Promoters of this plan are estimating costs for the first 20 years (from 184 million to 188 million) to downplay the expected cost to the community. There is no stretch of my imagination that can lead me to conclude that this is a cost-effective plan.

Developers in the Austin area have promoted this plan following lawsuits threatened by Earth 1st! against projects which have since sought their own individual "take" permits. However, rural landowners will continue to resist local funding for a federal program. We also must object to not having a guarantee from USFWS that the plan is sufficient to cover other species that have been petitioned for listing. Two new area species that have already been petitioned for listing in recent months are the Barton Springs Salamander and the American Mountain Lion (cougar). There has been no media coverage of the potential of the proposed listing of the cougar even though Lake Travis is a part of it's historical range.

When enacted by Congress the ESA was designed to prohibit the use of federal funds in projects that endanger listed species and to require federal agencies to preserve and recover those species and their habitat. Under the ESA, as amended, all persons and entities are prohibited from "taking" endangered species without a Sec. 7 incidental take statement (federally funded activities) or a Sec. 10a incidental take permit (all others) requiring minimization and mitigation for accidental take of species that occurs during development clearing.

Texas law allows cities, counties, and state agencies to

Bill Aleshire, February 11, 1992

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participate in land use planning for preservation of endangered species. Texas law has no incidental take concept that restricts development of private or public property when that development is judged to cause an incidental take of regulated habitat for endangered species. Under the Section 6 cooperative agreement between Texas and the USFWS, Texas law should be enforced until Texas law is changed.

The incidental take concept being used to restrict development in Travis County is found only in the regulations promulgated by USFWS to enforce court rulings regarding protection of habitat that has been mandated for actions involving Federal agencies. Every example of case law cited by environmentalists to justify local restrictions on habitat clearing are cases against Federal agencies that are required by the ESA to preserve and recover habitat. I have been unable to discover citations for any Texas case law regarding any action taken by USFWS against any landowner on private property for a violation of use restrictions in habitat.

This plan is a recovery plan that, if needed, is the responsibility of the USFWS, not private development. I believe this plan has been fraudulently promoted by the USFWS and the Texas Nature Conservancy for the hidden purpose of creating a local plan that exceeds the legally enforceable requirements of the ESA. A key reason for Texas Nature Conservancy involvement has clearly been to benefit financially from reduced land values while acting as an intermediary for the USFWS.

In my opinion, this plan will be the final tragedy for the local economy. This disastrous plan, having contributed to the demise of local savings and loans, now owned by R.T.C., will further devalue real estate beyond any possibility of rebound.

I protest the proposed sale of R.T.C. lands for this plan. I have protested to the R.T.C. without result. I have suggested to them that this proposal requires further study. My recommendation included consideration of placing use restrictions on the property before offering it for sale. It is my belief that a development plan under limited restrictions could replace the necessity for this conservation plan. I am told that a restriction plan was not considered advisable or even given any consideration at all. Under Section 4 of the ESA this can occur during designation of critical habitat proceedings.

I have sought from R.T.C. the public records disclosing the property appraisals and environmental studies used to evaluate the proposed discount sale. So far, officials at R.T.C. have failed to cooperate with my Freedom of Information Act request.

Now that the deadline for critical habitat designation is so near, it is unlikely that such designation can occur. In its absence, I would like to suggest an alternative to accepting the proposed "fire" sale price from Texas Nature Conservancy. R.T.C. should seek a Section 7 development consultation with USFWS.

This should include an application for an incidental take statement for a development plan for all R.T.C. properties. This

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Bill Aleshire, February 11, 1992

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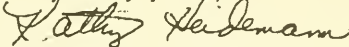
proposal is recommended to evaluate prospects for environmentally sensitive development under definite guidelines approved by USFWS for all R.T.C. properties. Under Section 7 the USFWS is limited in what can be required for an incidental take statement. Any conditions imposed by USFWS must be reasonable and prudent and are limited to those measures that are "necessary and appropriate" to minimize the impact...." Further, the regulations approved by USFWS in 1986 to implement the section 7 (b)(4)/7(o)(2) exception limit reasonable and prudent requirements to those which "cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."

Once the incidental take statement and it's conditions are known, the RTC will be in a good position to offer all properties for sale to the highest bidder. At that time we can expect a high return to compensate taxpayers for the savings and loan bail out that has been worsened in Travis County by endangered species restrictions.

However, if the R.T.C. sale takes place without an incidental take statement under Section 7, and the BCCP is approved, the prospective buyers of other R.T.C. properties will be unable to develop without paying the fee for the Section 10a permit. This is the reason that there have been no willing buyers other than the Texas Nature Conservancy. For the economic welfare of Austin, the development plan needs to be approved while the property is controlled by a federal agency to benefit from the less strict Section 7 exception allowed under federal law.

It is my belief that we will successfully oppose funding for this plan. The R.T.C. would be well advised to consider this as an alternative plan during this interim period because we intend to see that funding will never be provided. I hope you will give this recommendation some thought and do what you can to forestall the R.T.C. "fire" sale in Central Texas. This property should be made attractive by known restrictions and offered out to the general public for the highest bidder.

Very truly yours,



Kathryn F. Heidemann
Hill Country Landowners Coalition
1002 Ash St.
Georgetown, Texas 78626
(512) 863-2935



Analysis of Economic Benefits to Residual RTC Holdings

The effect of the proposed transaction on residual RTC holdings is difficult at best to determine. The Travis County real estate economy has been adversely affected over the past seven years by a number of factors in addition to endangered species considerations, including a significant regional recession, the collapse of real estate markets (especially raw land markets) nationwide, the lack of available financing or venture capital to acquire or complete projects, and the implementation of a stringent comprehensive watershed ordinance by the City of Austin. While the endangered species listing of the Golden-Cheeked Warbler, the Black-Capped Vireo, and other indigenous species has definitely had a negative effect on the market, it remains difficult to extrapolate the sole effect of endangered species issues from the other negative factors at work in the submarket.

By any comparison, residual properties will be positively impacted by a regional 10(a) permit by virtue of the fact that landowners would not have to pursue individual consultations with the U. S. Fish and Wildlife Service. In some cases, such consultations could be performed relatively quickly and at minimal cost. In most cases, however, the consultation process would involve protracted study periods, costs to retain independent contractors, and in some cases significant costs to protect or acquire mitigation sites. By removing the uncertainties surrounding properties in the study area through the issuance of a regional 10(a) permit, residual properties will become more marketable.

The effect of a regional 10(a) permit will logically be different with respect to specific properties, and will be contingent upon such factors as the location of the property, access to the tract, topography, utility availability, zoning, and watershed considerations. Those properties that already have superstructures in place or have immediate access to utilities will likely be more positively affected than properties without such development capabilities. Similarly, those properties with active subdivision plats and required approvals through the City of Austin will see a more immediate value impact than more isolated or remote tracts. On the other hand, tracts that contain habitat but that have limited access and no utility commitments may see no immediate impact from a regional 10(a) permit.

After the proposed transaction, the RTC as conservator or receiver will own or control interests in 9,255 acres (per current inventories). Of this residual acreage, approximately 2,573 acres either do not contain habitat or have not been surveyed to determine the status of habitat. For purposes of this discussion, the 2,573 "unclassified" acres will be considered not to contain habitat, and thus the assumption will follow that little or no value impact will be caused by a regional 10(a) permit. The remaining 6,682 acres that the RTC will own or control have been identified as containing some habitat, and thus a regional permit should increase both the marketability and the value of these residual tracts. While a tangible value increase is almost impossible to quantify on an individual basis, much less an aggregate basis, conversations with appraisers, property owners, potential purchasers, and government officials have indicated that the potential value increase for habitat properties under a regional permit could range from \$0/acre to \$2,500/acre. Again, the potential effect will be property specific, but a conservative estimate with respect to the RTC's residual holdings can be narrowed to \$1,000/acre. Based on this subjective estimate, the residual benefit to the RTC from the proposed transaction would be as follows:

<u>Asset Type</u>	<u>Acreage</u>	<u>Estimated Benefit</u>
REO Property	6,186 acres x \$1,000/acre	\$6,186,000
Limited Partnership Interests	496 acres x \$1,000/acre x .5	\$ 248,000
Totals	6,682 acres	\$6,434,000

Additional monetary benefits as a result of the proposed transaction would accrue to the RTC in the form of (a.) reduced holding costs (especially exorbitant special district taxes) on properties sold in the bulk transaction, and (b.) reduced marketing times for residual properties. While the monetary benefits associated with residual properties are impossible to accurately predict, it is clear that the issuance of a regional 10(a) permit as a result of an approved regional habitat plan will positively affect the marketability of residual assets.

(Revised)
From RTC Sales Contract to the ^{Texas} Nature Conservancy

From
RTC Sales Contract as
Revised for Sale to Texas
Nature Conservancy

NOTE DIFFERENCE BETWEEN SALES PRICE APPROVED IN CASE ACTIONS
AND CONTRACT CONSIDERATIONS:

Original Negotiated Sales Price	\$15,500,000
Less: Adjustment for Northlake Ranch Tract Subsequently Excluded from Package at \$750/acre for 453 acres	(\$ 339,750)
Less: Adjustment of \$1,000/acre for 100 acres of Lime Creek Road Tract Placed Under Contract to Melvin Simon & Associates Prior to TNC Executed Contract	(\$ 100,000)
Final Contract Consideration	\$15,060,250

From

RTC Sales Contract as
Revised for Sale to Texas

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